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THE INADEQUACY OF EXISTING 'FAR' PROVISIONS TO ENSURE CONTRACTOR
ENVIRONMENTAL COMPLIANCE

By

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INTRODUCTION

Our federal government buys approximately \$200 billion worth of goods and services each year from the private sector.¹ The government makes most of these purchases through contracts governed by the Federal Acquisition Regulation (FAR), which became effective in 1984.² Additionally, most major federal agencies, such as the Department of Defense (DoD), Department of Energy (DoE), Environmental Protection Agency (EPA), and National Aeronautics and Space Administration (NASA), supplement the FAR with agency-specific regulations.³ Certain provisions and contract clauses found in the FAR and its supplements directly or indirectly require government contractors to comply with environmental laws.⁴ The late 1970s and the 1980s brought about a plethora of federal and state environmental laws that both

¹ National Performance Review, "1993 Report: From Red Tape to Results: Creating a Government that Works Better and Costs Less," Chapter 1, Introduction, Sep. 7, 1993; Stephen Barr, *Trying to Add Common Sense to Procurement; Congress, Administration Work to Streamline Process*, Washington Post, Feb. 24, at A25. Differing estimates can be found. See Mark Lacey, *Federal Listing Puts Squeeze on Contract Rogues; Crime; Numerous Valley Firms Join Others Barred from Doing Business with Uncle Sam Due to Fraud, Bribery or Other Offenses*, L.A. Times, Feb. 12, 1996 ("roughly \$400 billion . . . every year").

² 48 C.F.R. ch.1, subchs. A-H. *But see* R. Mangrum & E. Marcotte, *Selling to Uncle Sam is Getting Easier*, Legal Times, Jun. 17, 1996, S27, at S 45, col 1 (discussing fact that the Federal Aviation Administration received statutory authority "to develop an entirely new acquisition-management system. . ."; noting that the new system is expressly exempt from most major acquisition statutes and the FAR; and outlining the major provisions of the FAA's new system).

³ See 48 C.F.R. Chapters 2 (DoD), 9 (DoE), 15 (EPA), and 18 (NASA).

⁴ See, e.g., FAR part 23, Environment, Conservation, Occupational Safety, and Drug-free Workplace.

contracting agencies and government contractors must be aware of.⁵ In the context of a federal procurement, the obligation to comply with environmental laws and regulations may rest on the government, the contractor, or both.⁶ Regrettably, both the government⁷ and its contractors⁸ have at times failed to comply with these standards.⁹

⁵ See Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 Am. U.L. Rev. 1585, at 1635, n.1 (1994) ("For example, at the federal level, the primary environmental laws affecting government contractors include: the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2671 (1988 & Supp. V 1993); the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f to 300j-26 (1988); the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992); the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988 Supp. IV 1992). Many of the federal environmental statutes also have state counterparts that contain pollution control requirements at least as stringent and, possibly, more stringent, than federal law.").

⁶ L. Hourcle, R. Lingo, & F. Esposito, *Environmental Law in the Fourth Dimension: Issues of Responsibility and Indemnification with Government Owned-Contractor Operated Facilities*, 31 A.F. L. Rev. 245, 248-49 (1989). See also, C. Amantea & S. Jones, *supra* note 5, at 1585 (obligation of government contractors to comply with environmental laws is "well-established.").

⁷ See, e.g., *Maitland Bros. Co. and St. Paul Fire and Marine Insurance Company*, 90-1 BCA 22,367 (ASBCA No. 30,089, 1989) (Florida Department of Environmental Regulation determined MacDill Air Force Base officials violated Clean Water Act (CWA) and Florida environmental laws, when, after government submitted CWA section 403 (dredge and fill) permit application for golf course construction, its contractor filled wetlands before permit was issued; case was resolved by consent decree when Air Force agreed to perform mitigation by constructing eight acres of new wetlands at a cost of over \$276,000).

⁸ See, e.g., EPA Press Advisory, EPA 96-R-103, *Illegal Dumping of Low Level Hazardous Radioactive Wastes Leads to Felony Guilty Plea for New York Company and its President*, Jul. 19, 1996, 1996 WL 404068, at 4. Defense contractor Broomer Research Corp. and its President pled guilty to two felony violations of RCRA for improper disposal of low level radioactive hazardous wastes "... by pouring them into the facility's storm drains, sinks, and sanitary outfalls which emptied into the facility's

This thesis focuses on situations where the obligation is on the contractor, and examines the existing FAR provisions and clauses to explore whether they are adequate to ensure government contractor compliance with environmental laws. For example, the contract clause at FAR 52.223-2, "Clean Air and Water," mandatory in contracts expected to exceed \$100,000, requires the contractor to agree, among other things, to comply with certain specified sections of the Clean Water Act and Clean Air Act; and to "use best efforts to comply with clean air standards and clean water standards" at the facility where the contract will be performed.¹⁰ On its face, the clause is limited to compliance with the Clean Air and Clean Water Acts. One issue this thesis will examine is whether this clause is sufficiently broad, or should be expanded to require compliance with other environmental laws.

Chapter 1 examines FAR part 23, which deals directly with environmental compliance responsibilities. Chapter 2 explores contractor liability under the False Claims Act for false certifications by a contractor that it fully complied with either the contract requirements or all "laws and regulations" (including environmental laws). The remainder of the thesis will examine other FAR provisions and clauses which can

septic system and created a threat to the aquifer).

⁹ See, e.g., *Washington State Levies Fines on DoE, Westinghouse under Federal Facilities Act*, Fed. Cont. Daily (BNA), Mar. 16, 1993. (Washington Dept. of Ecology assessed fines totaling \$100,000 jointly against DoE and its operating contractor, Westinghouse Hanford Co., for violations of the Federal Facilities Compliance Act; specifically, inadequate testing and improper labeling of drums containing hazardous wastes, specifically, contaminated dirt and material from cleanup of chemical spills.).

¹⁰ FAR 52.223-2(b).

be used to ensure contractor environmental compliance, or to deter noncompliance. Chapter 3 looks at suspension, debarment, and EPA "Listing" as tools to ensure compliance. Chapter 4 examines a number of miscellaneous contract provisions and clauses having relevance in the environmental compliance arena, such as the default clauses,¹¹ "permits and responsibilities" clause in construction contracts,¹² government-furnished property clauses,¹³ and FAR subpart 9.1, "Responsible Prospective Contractors." Finally, chapter 5 sets out the shortcomings of the FAR identified by this author, and proposes a number of suggested changes to the FAR, designed to clarify the environmental compliance obligations of contractors performing federal government contracts.

¹¹ See, e.g., FAR 52.249-8, Default (Fixed-price Supply and Services).

¹² FAR 36.507; FAR 52.236-7.

¹³ FAR subpart 45.3.

CHAPTER 1

FAR PART 23- ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG FREE WORKPLACE

A. Pollution Control and Clean Air and Water, FAR subpart 23.1.

The scope of FAR part 23 is stated broadly: "This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace and for protecting and improving the quality of the environment through pollution control, energy conservation, identification of hazardous material, and use of recovered materials."¹⁴ However, as early as 1989, commentators noted that the basic provisions of part 23 address only Clean Air Act (CAA) and Clean Water Act (CWA) compliance.¹⁵ For example, FAR 23.103, "Policy," states:

(a) It is the Government's policy to improve environmental quality. Accordingly, executive agencies shall conduct their acquisition activities in a manner that will result in effective enforcement of the Clean Air Act (the "Air Act") and the Clean Water Act (the "Water Act").

(b) Except as provided in 23.104, executive agencies shall not enter into, renew, or extend contracts with firms proposing to use facilities listed by EPA (40 CFR part 15) [now part 32] as violating facilities under the Air Act or the Water Act. (emphasis added).¹⁶

In the "Authorities" section, FAR 23.102, the only statutes listed are the CAA and CWA. Similarly, FAR 23.107, "Compliance Responsibilities," requires a contracting officer who learns of a contractor's noncompliance with "clean air or water standards in

¹⁴ FAR 23.000.

¹⁵ L. Hourcle, *et al*, *supra* note 6, at 250.

¹⁶ FAR 23.103.

facilities used to perform nonexempt contracts” to notify the agency head or a designee, “who shall promptly notify the EPA Administrator or a designee in writing.” Section 23.107 also states that “[p]rimary responsibility for ensuring compliance with Federal, State, or local pollution control laws and related requirements rests with EPA and other agencies designated under the laws.” Taken together, these provisions appear to place a ‘whistle blower’ obligation on contracting officers with respect to CAA and CWA violations, while telling them to leave discovery and reporting of violations of other environmental laws up to the regulatory enforcement agencies.

The real substance of subpart 23.1 is found in FAR 23.105, “Solicitation Provision and Contract Clause.” It requires insertion of the “Clean Air and Water” clause, FAR 52.223-2, in solicitations and contracts if: “(1) The contract is expected to exceed \$100,000; (2) The contracting officer believes that orders under an indefinite quantity contract in any year will exceed \$100,000; or (3) A facility to be used has been the subject of a conviction under . . . [the CAA or CWA] and is listed by EPA as a violating facility; and (4) The acquisition is not otherwise exempt under 23.104.”¹⁷ If the requirements for insertion of the “Clean Air and Water” clause are met, FAR 23.105 also requires insertion of the solicitation provision at FAR 52.223-1, “Clean Air and Water Certification.”

1. Clean Air and Water contract clause.

¹⁷ FAR 23.105(b).

This clause defines terms such as "clean air standards,"¹⁸ "clean water standards,"¹⁹ and "compliance."²⁰ It then states the contractor's obligations:

(b) The contractor agrees--

(1) To comply with all the requirements of section 114 of the Clean Air Act . . . and section 308 of the Clean Water Act . . . relating to inspection, monitoring, entry, reports, and information, . . . and all regulations and guidelines issued to implement those acts before the award of this contract;

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the (EPA) List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of the facility from the listing;

(3) To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed; and

(4) To insert the substance of this clause into any nonexempt subcontract, including this subparagraph (b)(4).²¹

¹⁸ "'Clean air standards,' . . . means-- (1) Any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, work practices, or other requirements contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738; (2) An applicable implementation plan as described in section 110(d) of the Air Act (42 U.S.C. 7410(d)); (3) An approved implementation procedure or plan under section 111(c) or section 111(d) of the Air Act (42 U.S.C. 7411(c) or (d)); or (4) An approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 7412(d))." FAR 52.223-2(a).

¹⁹ "'Clean water standards,' . . . means any enforceable limitation, control, condition, prohibition, standards, or other requirement promulgated under the Water Act or contained in a permit issued to a discharger by the . . . (EPA) or by a State under an approved program . . . , or by local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317)." FAR 52.223-1(a).

²⁰ "'Compliance,' . . . means compliance with-- (1) Clean air or water standards; or (2) A schedule or plan ordered or approved by a court of competent jurisdiction, the . . . (EPA), or an air or water pollution control agency under the requirements of the Air Act or Water Act and related regulations." FAR 52.223-2(a).

²¹ 48 C.F.R. § 52.223-2(b).

The Clean Air and Water clause draws an important distinction between requirements “relating to inspection, monitoring, entry, reports, and information” on the one hand, and clean air and water standards on the other. By its terms, the clause requires compliance with certain CAA and CWA sections dealing with inspection, monitoring, entry, and so forth. However, it only requires contractors to use their “best efforts” to comply with the applicable clean air and clean water standards. Further, while subparagraph (b)(3) requires “best efforts” to comply “*at the facility in which the contract is being performed,*” subparagraph (b)(1) has no such location limitation. Thus, it appears that where the clause is inserted in a government contract, subparagraph (b)(1) should operate to require the contractor to comply with sections 114 of the Clean Air Act and section 308 of the Clean Water Act at all of its facilities, whether they are being used in performing the contract containing the clause or not. However, it is debatable what contractual remedy, if any, would be available to the government in the event a contractor failed, for example, to meet its reporting requirements at a facility not being used for the performance of the contract, and where there is no negative impact on the contract containing the clause. The issue would seem to be whether a violation of subparagraph (b)(1) of the Clean Air and Water clause with respect to a facility not being used in performing the contract would constitute a failure to perform a “material requirement” of the contract containing the clause. If so, the violation would give rise to a right to terminate the contract for default. This issue is addressed more thoroughly in section A.2. of this Chapter and in Chapter 4, *infra*.

The phrase "best efforts to comply" is not defined in the FAR, though it seems to set a lower standard for contractors to meet than "compliance." Despite the obvious difference in wording, little has been written about the significance of the distinction between the subparagraphs requiring contractors "to comply" on the one hand, and to "use best efforts to comply" on the other. One commentator, Mr. Paul Morenberg, has stated that the "best efforts" standard is "ambiguous," but seems to require contractors to "use good faith in meeting statutory requirements."²²

In *Active Fire Sprinkler Corp.*,²³ the General Services Board of Contract Appeals discussed the application of this clause in the context of a construction contract for the installation of a fire protection sprinkler system in several federal buildings in New York City. The contractor appealed the contracting officer's denial of its claim for compensation for direct costs and delays the contractor alleged resulted from the government's insistence on compliance with EPA asbestos regulations.²⁴ The contract contained the Clean Air and Water clause requiring the contractor to use "best efforts to comply" with clean air and clean water standards, as well as the Permits and Responsibilities clause.²⁵ The government argued that since the Clean Air and Water clause required the contractor to comply with the Clean Air Act and any implementing

²² Paul W. Morenberg, *Environmental Fraud by Government Contractors; a New Application of the False Claims Act*, 22 B.C. Envtl. Aff. L. Rev. 623, 656 (Spring 1995).

²³ 85-1 BCA 17,868 GSBGA No. 5461 (1984) (1984 WL 13904).

²⁴ *Id.*

²⁵ *Id.*, 1984 WL 13904 at 58-61.

regulations, the contractor was responsible for ascertaining and taking any needed precautions for dealing with the presence of asbestos in the fireproofing materials.²⁶

However, the Board rejected the government's argument, stating:

[I]t is incorrect to assert that the contract provision requiring appellant to comply with the Clean Air Act was sufficient to lead appellant to examine the Act and its implementing regulations, and then to ask whether the site contained asbestos. The sequence can only be expected to occur in the opposite order: when the contractor is given the requisite information (or as is not the case here, can reasonably be expected to obtain the information) -- here that the site contains asbestos -- it then examines the statutes and regulations it is imputed to know to determine how the project will be affected.²⁷

The Board also rejected the government's argument that the contractor was responsible for compliance with the asbestos regulations under the Permits and Responsibilities clause, finding that the government "misrepresented site conditions" and that the government "was in a better position to disclose this fact [the presence of asbestos in the buildings] than appellant was to ask the question."²⁸ The Board granted recovery for the contractor for the costs of complying with the asbestos regulations, as well as for additional work practices not required by the regulations but directed by the contracting officer.²⁹

If *Active Sprinkler Corp.* is any indicator of how the boards and courts will

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

examine contractors' responsibilities under the Clean Air and Water clause, then "best efforts to comply" does not appear to set a very high hurdle for contractors to clear. To expand on Mr. Morenberg's suggested interpretation of the phrase, it may simply require contractors to use 'good faith in meeting statutory *and regulatory* requirements *about which the contractor knew or reasonably should have known.*' The GSA Board's treatment of the issue in *Active Sprinkler Corp.* seems to indicate that more than a "good faith" effort to comply is required, and that contractors who are negligent in failing to comply with clean air or water standards may be found to have violated the clean air and water clause.

The Environmental Protection Agency has provided some indication of how it interprets this phrase in another context -- that of environmental audits. In its "Audit Policy Interpretive Guidance," the EPA states that if potential environmental violations are disclosed before they occur, they are generally eligible for penalty reductions under the audit policy.³⁰ "For example, if the violations cannot be avoided despite the regulated entity's *best efforts to comply* (e.g., where an upcoming requirement to retrofit a tank cannot be met due to unforeseeable technological barriers), EPA may mitigate the gravity-based penalty once the violation actually occurs."³¹ The EPA's example of what constitutes "best efforts to comply" seems to indicate something more than a lack of negligence is required. Rather, it seems to require regulated entities who

³⁰ Gary A. Jones, U.S. E.P.A., *Audit Policy Interpretive Guidance*, American Law Institute-American Bar Association Course of Study, May 8, 1997, SB43 ALI-ABA 189 (1997).

³¹ *Id.* (emphasis added).

violate an environmental statute or regulation to show something closer to what is known in the contract arena as "impossibility" or "impracticability" of performance, in order to receive a penalty reduction.

How the courts and boards will interpret the meaning of the phrase "best efforts to comply" in the Clean Air and Water clause remains unclear. Nonetheless, this much is certain: the clause requires only "best efforts" to comply with clean air and clean water standards, and does not require *any* effort at compliance with the myriad other federal or state environmental laws and regulations.³²

2. Materiality of the Clean Air and Water clause and other FAR provisions and Clauses.

Whether this, and other contract clauses dealing with environmental compliance, are found to be a "material" requirements of a particular government contract can have far-reaching impacts. One area in which this determination has important ramifications is in the breach of contract area. As discussed in Chapter 4, *infra*, supply and services contractors can be terminated for default if they fail to perform "any other provision" of their government contract. However, most courts and boards require that the "other provision" violated be a material requirement of the

³² Morenberg, *supra* note 22, at 657. See also, *Defense Systems Corp. and Hi-Shear Technology Corp.*, 95-2 BCA 27,721, ASBCA No. 43,705 (1995) (Though contractor received criminal conviction for violating RCRA by improperly transporting and storing hazardous material, Board found contractor had a valid permit which did not preclude it from open burning of hazardous waste in Nevada; thus, it found no violation of the Clean Air and Water clause, and no ground for default termination, despite the fact the waste was improperly "transported to, stored at and burned at a remote site at the facility" where the contract was being performed).

contract.³³

Another area where the determination of materiality is important is in the False Claims arena. As the discussion in Chapter 2, *infra*, will show, some courts have also discussed the “materiality” requirement with respect to false claims.

In most cases, the Clean Air and Water clause is likely to be held to be a material requirement of a government contract. The boards and courts have used different terms and phrases to describe what a material requirement or a material term of a contract is. For example, the GSBCA has stated that “substantial noncompliance with a significant contractual requirement” is a proper basis for a default termination.³⁴ The Department of Transportation Contract Appeals Board has held that failure to comply with a “substantial condition of performance” was a breach justifying a termination for default.³⁵ And the United States Court of Appeals for the Federal Circuit has held that a failure to maintain payroll records and timecards was “not a mere technicality,” even though the reporting standards were “not related to contract

³³ See, e.g., *Brandywine Prosthetic-Orthotic Svc., Ltd.*, 93-1 BCA ¶ 25,250, VABCA No. 341 (1992) (government must establish that contractor “breached a material provision of the contract and . . . the contractor has been given the opportunity to rectify or cure its breach.” (internal citation omitted)); *Precision Products*, 82-2 BCA ¶ 15,981, ASBCA No. 25280 (1982) (Under “the unusual circumstances of this case,” failure to follow contract provision regarding place of manufacture of production articles held *not* to be a material breach of contract); *Ann Riley & Associates*, 93-3 BCA 25,963, DOTCAB No. 2418 (1993) (failure to furnish pricing reports was “a substantial condition of performance, one that was unmet,” justifying default termination).

³⁴ *Old Dominion Security, Inc.*, 88-2 BCA ¶ 20,285, GSBCA No. 8563 (1988) (upholding default termination of security firm for failure to obtain a valid state security contractor’s license).

³⁵ *Ann Riley & Associates*, *supra* note 33.

performance,” and therefore, the government’s action in terminating the contractor for default was justified.³⁶ The court was particularly influenced by the fact that the contract requirement to retain the employment and payroll records was “essential to the enforcement mechanisms of the [Davis-Bacon and Copeland Anti-Kickback] Acts.”³⁷

Similarly, it is this author’s position that the Clean Air and Water clause, and the Clean Air and Water Certification discussed below, are essential to the enforcement of the Clean Air Act and the Clean Water Act with respect to government contractors. In fact, the DoD, GSA, and NASA recently acted to ensure the Clean Air and Water Certification remained a part of certain government contracts, when it determined that the Certification “is the least burdensome and most effective way to avoid entering into a contract with a Clean Air Act or Clean Water Act violator.”³⁸ The Clean Air and Water clause has several distinct and very important functions: it requires contractors to agree not to perform any part of the contract in a “violating facility,” it requires contractors to agree to comply with inspection, monitoring and similar requirements, and requires them to use “best efforts to comply” with clean air and clean water standards. These requirements are highly unlikely to be held to be, in the words of the Court of Appeals for the Federal Circuit, “mere technicalities.” Instead, while the facts of each case will be important, the Clean Air and Water clause is nevertheless much

³⁶ Kelso v. Kirk Brothers Mechanical Contractors, Inc., 16 F.3d 1173, 1176 (Fed. Cir. 1994).

³⁷ Id. at 1176.

³⁸ 62 Fed. Reg. 233, 234 (announcing final rule, January 2, 1997).

more likely to be found to be a “significant contractual requirement” or a “substantial condition of performance.”³⁹

3. Clean Air and Water Certification. The Certification requires offerors to certify that:

- (a) Any facility to be used in the performance of this proposed contract is [], is not [] listed on the Environmental Protection Agency (EPA) List of Violating Facilities;
- (b) The Offeror will immediately notify the Contracting Officer, before award, of the receipt of any communication from the Administrator, or a designee, of the EPA, indicating that any facility that the Offeror proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities; and
- (c) The Offeror will include a certification substantially the same as this certification, including this paragraph (c), in every nonexempt subcontract.⁴⁰

The EPA is required to “list” those facilities at which a violation of CAA section 113 (42 U.S.C. § 7413) or CWA section 309(c) (33 U.S.C. § 1319(c)) resulting in a criminal conviction has occurred.⁴¹ In the case of the CAA, the EPA Administrator may extend the prohibition against contracting with CAA violators to “other facilities owned or

³⁹ Cf. United States ex rel Fallon v. Accudyne Corp. and Alliant Technosystems, Inc., 921 F.Supp. 611, 627 (W.D. Wisconsin 1995) (holding, in the context of an alleged false claim by a government contractor, that environmental compliance provisions were “a material part of those government contracts . . .”).

⁴⁰ FAR 52.223-1.

⁴¹ 42 U.S.C. § 7606(b) (CAA); 33 U.S.C. § 1368(b) (CWA). At least one author has, perhaps more aptly, described this as “blacklisting.” James L. Conrad, *Buying Green: Implementation of Environmentally-Sound Purchasing Requirements in Department of Defense Procurements* 34, Sep. 30, 1993 (unpublished thesis) (available in the Library of the George Washington University Law School).

operated by the convicted person.”⁴² Federal agencies are prohibited from entering into contracts with offerors who are on this list until the EPA Administrator “certifies that the condition giving rise to such conviction has been corrected.”⁴³ The certification required by FAR 52.223-1 is limited to an assertion that none of the offeror’s facilities to be used in performing the contract are listed nor proposed for listing by EPA for a violation of the CAA or CWA.

Recently, a proposal was made to eliminate the Clean Air and Water Certification requirement from the FAR.⁴⁴ The Certification was ultimately retained “because the Government . . . concluded that the certification is the least burdensome and most effective way to avoid entering into a contract with a Clean Air Act or Clean Water Act violator.”⁴⁵ However, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council indicated that they are not finished “tinkering with” the

⁴² 42 U.S.C. § 7606(a).

⁴³ 42 U.S.C. § 7606(a) (CAA); 33 U.S.C. § 1368(a) (CWA).

⁴⁴ 61 Fed. Reg. 48,354 (1996) (proposed Sept. 12, 1996). The proposal was made in response to the directive of Congress in the FY 1996 National Defense Authorization Act (P.L. 104-106, Section 4301(b)(1)(A), Feb. 10, 1996) (Federal Acquisition Reform Act of 1996), that the Administrator for Federal Procurement Policy issue a proposal to amend the FAR to remove from it any certification requirements not specifically imposed by statute. Certification requirements found in more than 50 FAR clauses, provisions, or standard contract forms were proposed for deletion or modification. Congress also prohibited the promulgation of new certification requirements unless certain conditions were met. P.L. 104-106, § 4301(b)(2) (codified at 41 U.S.C. § 425(c)).

⁴⁵ 62 Fed. Reg. 233, 234 (1997) (announcing final rule, Jan. 2, 1997). Such a finding was required in order to keep the certification in the FAR. See P.L. 104-106, § 4301(b)(1); 41 U.S.C. § 425, Note.

Clean Air and Water Certification, so change may still be on the horizon.⁴⁶

B. Hazardous Material Identification and Material Safety Data, FAR Subpart 23.3.

The purpose of FAR subpart 23.3 is to enable Government agencies to comply with Occupational Safety and Health Administration (OSHA) regulations requiring employers to advise their employees of hazards they may be exposed to, symptoms of exposure and emergency treatment, and "proper conditions and precautions for safe use and exposure."⁴⁷ In the context of the procurement of supplies, this is accomplished by requiring contractors to submit hazardous materials data whenever supplies being acquired under the contract are identified as hazardous materials.⁴⁸ The data is submitted using Material Safety Data Sheets (MSDSs), which are required (1) for any material identified as hazardous in the latest version of Federal Standard No. 313,⁴⁹ including revisions thereto adopted during the contract term; or (2) for any other material which a

⁴⁶ 62 Fed. Reg. 233, 234. (Indicating a proposal to "substitute a more limited clean air and water certification and a Clean Air and Water Act notification for commercial items" would be published for public comment "in the near future."). *See also* "Acquisitions: Kelman asks FAR Council to Revisit Remaining Certifications, Substitutions", Federal Contracts Daily (BNA), Apr. 30, 1997 (Indicating aerospace industry's dissatisfaction with the results of the effort to eliminate nonstatutory certifications from the FAR. According to Aerospace Industries Association Vice President LeRoy J. Haugh, only 16 of 80 certification requirements in the FAR were deleted, while 36 (45%) were retained, and 12 were changed to an assertion, representation, statement, or declaration.).

⁴⁷ FAR 23.302(a).

⁴⁸ FAR 23.302(b).

⁴⁹ *See* FAR 23.301 (Publishing address at General Services Administration where Federal Standards can be purchased).

Government technical representative designates as "potentially hazardous and requiring safety controls."⁵⁰ Apparently successful offerors must submit MSDSs prior to contract award, and for agencies other than DoD, contractors must submit them again at time of delivery.⁵¹ Finally, the contracting officer must provide copies of all MSDSs received to the safety officer or other designated individual.⁵² The Department of Defense FAR supplement imposes additional requirements. First, contractors must submit "Hazard Warning Labels" in addition to the MSDSs (FAR 223.302(b)). Second, contracting officers must provide the warning labels to the safety officer or other designated official to facilitate inclusion of the relevant data in the agency's MSDS information system or label information system.⁵³

While these provisions go a long way toward protecting government employees, they do little to ensure contractor compliance with environmental laws concerning handling and disposal of hazardous materials,⁵⁴ such as the Resource Conservation and

⁵⁰ FAR 23.302(c).

⁵¹ FAR 23.302(d). Failure to submit the MSDSs prior to award may result in the offeror being found nonresponsible and ineligible for award. FAR 52.223-3(d).

⁵² FAR 23.302(e). *See also* FAR 252.223-7001 (contract clause - "Hazard Warning Labels").

⁵³ DoD FAR Supplement (DFARS) 223.302(e). This is required "to facilitate -- (i) Inclusion of relevant data in the department/agency's . . . [MSDS] information system or label information system; and (ii) Other control, safety, or information purposes." *Id.*

⁵⁴ *See* L. Hourcle, *et al*, *supra* note 6, at 250 (discussing the limited scope of the FAR clauses in part 23, including subpart 23.3).

Recovery Act of 1976 (RCRA)⁵⁵ or State and local environmental laws and regulations. However, the mandatory contract clause in contracts requiring the delivery of hazardous materials, FAR 52.223-3, does make clear that “[n]othing contained in this clause shall relieve the Contractor from complying with applicable Federal, State, and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) in connection with hazardous materials.”⁵⁶ Agency contracting and legal personnel should ensure the clause is inserted in those contracts where required, and should use the clause to encourage contractor compliance with all environmental laws--Federal, State, and local.

C. Contracting for Environmentally Preferable and Energy Efficient Products and Services - FAR Subpart 23.7

This subpart, which was only added to the FAR in 1995, requires agencies to implement preference programs “favoring the acquisition of environmentally preferable and energy efficient products and services.”⁵⁷ The subpart requires that the following environmental objectives be considered throughout the acquisition process:

⁵⁵ Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

⁵⁶ FAR 52.223-3(g). The clause also states that “[n]either the requirements of this clause nor any act or failure by the Government shall relieve the Contractor of any responsibility or liability for the safety of Government, Contractor, or subcontractor personnel or property.” FAR 52.223-3(f). This clause is similar to FAR 52.236-7, “Permits and Responsibilities,” which is used in construction and fixed price demolition or dismantling contracts, discussed in Chapter 4, *infra*. See *Superior Abatement Services, Inc.*, 94-3 BCA 27,278 (ASBCA No. 47121, 1994) (giving same effect to Permits and Responsibilities clause, and the language in subparagraph (g) of FAR 52.223-3 with respect to a contractor’s obligation to obtain licenses and permits).

⁵⁷ FAR 23.704(a).

- (1) Obtaining products and services considered to be environmentally preferable (based on EPA-issued guidance).
- (2) Obtaining products considered to be energy-efficient, i.e., products that are in the upper 25 percent of energy-efficiency for all similar products, or products that are at least 10 percent more efficient than the minimum level that meets Federal standards (see Executive Order 12902, Section 507).
- (3) Eliminating or reducing the generation of hazardous waste and the need for special material processing (including special handling, storage, treatment, and disposal).
- (4) Promoting the use of nonhazardous and recovered materials.
- (5) Realizing life-cycle cost savings.
- (6) Promoting cost effective waste reduction when creating plans, drawings, specifications, standards, and other product descriptions authorizing material substitutions, extensions of shelf-life, and process improvements.⁵⁸

Although these are laudable goals, they do not go as far as those proposed in 1993 by the Changes Subcommittee of the FAR Council.⁵⁹ Rather than the current paragraph, the subcommittee had proposed a more expansive one, mirroring that which became subparagraphs 1-4 of FAR 23.704(b), but also including the following:

- (e) Achieving environmental compliance and improvement by:
 - (1) Creating environmentally beneficial plans, drawings, specifications, standards, and other purchase descriptions that include the means to achieve benefits such as allowing material substitutions, extensions of shelf-life, and process improvements;
 - (2) Using evaluation factors which accord higher evaluative weight to offerors submitting environmentally superior proposals, e.g., proposals offering nontoxic substitutes for toxic materials, process improvements to reduce pollution o[r] the use of recovered materials;

⁵⁸ FAR 23.704(b) (as amended by FAC 97-01, August 22, 1997, 62 Fed. Reg. 44809 (FAR Case 92-054A, Item V)).

⁵⁹ The committee had representatives from: DoD, NASA, EPA, Defense Logistics Agency (DLA), Office of Federal Procurement Policy (OFPP), and the Departments of Commerce, Transportation, and the Treasury. J. Conrad, *supra*, note 41, at 114, n. 286.

(3) Otherwise employing acquisition strategies that affirmatively implement the environmental responsibilities and objectives set forth in the subparts herein.⁶⁰

Additionally, the proposal included as a goal “[f]ostering pollution prevention.”⁶¹

The most significant difference between the Changes Subcommittee proposal and what ultimately became the FAR provision is the absence of the language in (e)(2) of the proposed provision.⁶² Using evaluation factors which would give a higher weight to offerors submitting “environmentally superior” proposals would be an effective way to motivate contractors to develop process improvements, substitute less harmful materials for hazardous materials, and use recovered or recycled materials.⁶³

Subparts 23.705 and 23.706 place requirements on what are commonly known as “GOCO” (government owned, contractor operated) contracts. New contracts for contractor operation of a government-owned or leased facility “shall require contractor programs to promote and implement cost-effective waste reduction in performing the

⁶⁰ J. Conrad, *supra* note 41, at 115. Mr. Conrad noted that subparagraph (e)(2), as proposed, seemed to discourage the use of recovered materials, and he suggested one way to revise the language. *Id.* at 116, n. 289.

⁶¹ *Id.* at 115.

⁶² FAR 23.704(b)(6) is closely analogous to that proposed in paragraph (e)(1) of the proposed provision, and in my view, states a clearer goal than the proposed “Creating environmentally beneficial plans, drawings”

⁶³ *Cf. DoE Reform Initiatives*, Fed. Cont. Daily (BNA), Feb. 24, 1993 (Announcing Department of Energy requirement that at least 51 percent of a contractor’s award fee must be based on compliance with environmental, safety, and health standards).

contract.”⁶⁴ Further, the provision required that existing contracts “should be modified” to provide for such waste reduction in contract performance, where this is “economically feasible.”⁶⁵ A contract clause, “Waste Reduction Program (May 1995)”⁶⁶ is prescribed for all solicitations and contracts for contractor operation of government-owned or leased facilities.⁶⁷ The clause defines waste reduction as “preventing or decreasing the amount of waste being generated through waste prevention, recycling, or purchasing recycled and environmentally preferable products.”⁶⁸ The clause then places an obligation on the contractor to “establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract.”⁶⁹ The program must also comply with “applicable Federal, state, and local requirements.”⁷⁰

1. Department of Defense FAR Supplement (DFARS) Provisions and Clauses.

DFARS subpart 223.70 specifies additional requirements in contracts for the “offsite treatment or disposal of hazardous waste” from DoD facilities.⁷¹ One

⁶⁴ FAR 23.705.

⁶⁵ Id.

⁶⁶ FAR 52.223-10.

⁶⁷ FAR 23.706.

⁶⁸ FAR 52.223-10(a).

⁶⁹ FAR 52.223-10(b).

⁷⁰ Id.

⁷¹ DFARS 223.7002.

significant contract clause is found at DFARS 252.223-7005, "Hazardous Waste Liability" (Oct. 1995). This clause requires contractors, upon receipt of hazardous waste, to agree to reimburse the Government for

[a]ny penalties assessed against, all liabilities incurred by, costs incurred by, and damages suffered by, the Government that are caused by-- (1) the Contractor's breach of any term of the contract; or (2) Any negligent or willful act or omission of the Contractor or employees of the Contractor, in the performance of the contract.⁷²

Additionally, the clause requires contractors, within 30 days of contract award, to demonstrate the ability to reimburse the government by providing evidence of liability insurance or proof that it can meet specified "financial assurance requirements."⁷³

Certain contracts are exempt from these requirements, such as those for performance of remedial or corrective action under the Defense Environmental Restoration Program or authorized State hazardous waste programs, and contracts where "the generation of hazardous waste to be disposed of is incidental to the performance of the contract."⁷⁴

2. Department of Energy Acquisition Regulation (DEAR) Supplement Provisions and Clauses.

The Department of Energy has the most detailed "environmental compliance" clause in the FAR. Entitled "Environmental Protection," it is applicable

⁷² DFARS 252.223-7005(b). This DFARS clause, and DFARS subpart 223.70, were added to implement Section 331, "Reimbursement Requirement for Contractors Handling Hazardous Waste from Defense Facilities," of the Fiscal Year 1992 Defense Authorization Act, P.L. 102-109, Dec. 5, 1991. 57 Fed. Reg. 14,988, 14996, Apr. 23, 1992. The provision was codified at 10 U.S.C. § 2708.

⁷³ DFARS 252.223-7005(c).

⁷⁴ DFARS 223.7002(b).

to DoE Management and Operating (M & O) Contracts.⁷⁵ The clause states that M & O contractors shall, in addition to complying with the requirements in the "Clean Air and Water" clause, comply with an extensive list of 19 specified federal statutes, Title 10 (Energy) of the Code of Federal Regulations, certain DoE directives, and "other Federal and non-Federal, environmental laws, codes, ordinances, Executive Orders, regulations and requirements in DoE Directives, as identified in writing by the contracting officer."⁷⁶ Further, the clause requires contractors to assist DoE in complying with another seven federal statutes, a half-dozen Executive Orders, and other Federal and non-Federal environmental laws, codes, ordinances, and so forth.⁷⁷ The clause also requires contractors to "flow-down" appropriate environmental protection

⁷⁵ "'Management and operating contract' means an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency." FAR 17.601.

⁷⁶ DEAR 970.5204-62(a) (48 C.F.R. § 970.5204-62(a)). Some of the federal statutes listed are: The Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*); the DoE Organization Act (42 U.S.C. § 7101 *et seq.*); The Energy Reorganization Act of 1974 (42 U.S.C. § 5801 *et seq.*); RCRA (42 U.S.C. § 6901 *et seq.*); CERCLA (42 U.S.C. § 9601 *et seq.*); The Safe Drinking Water Act (SDWA) (42 U.S.C. § 300 *et seq.*); The Toxic Substances Control Act (TSCA) (15 U.S.C. § 2601 *et seq.*); The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*); the Pollution Prevention Act of 1990 (42 U.S.C. § 13101 *et seq.*); and the Emergency Planning and Community Right-to-Know Act (EPCRA) (42 U.S.C. § 11001 *et seq.*). *Id.*

⁷⁷ DEAR 970.5204-62(b). The listed statutes include: The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. § 4321 *et seq.*); The Endangered Species Act of 1973 (16 U.S.C. § 1531 *et seq.*); The Noise Control Act of 1972 (42 U.S.C. § 4901 *et seq.*); the National Historic Preservation Act of 1966 (16 U.S.C. § 470 *et seq.*); and The Wild and Scenic Rivers Act (16 U.S.C. § 1273 *et seq.*). *Id.*

requirements to subcontracts for work to be done on DoE-owned or leased facilities.⁷⁸

Finally, the DoE clause addresses the possibility of errors or omissions in its list of laws contractors must comply with, stating that such errors or omissions will not be construed as a waiver nor will they form the basis for a defense by the contractor in any administrative, civil, or criminal proceeding.⁷⁹

D. Use of Recovered Materials; Ozone-Depleting Substances; Toxic Chemical Reporting; and other Environmental Provisions in FAR Part 23.

1. Use of Recovered Materials, FAR subpart 23.4. This subpart sets out the government's policy to "acquire, in a cost-effective manner, items composed of the highest percentage of recovered materials practicable consistent with maintaining a satisfactory level of competition without adversely affecting performance requirements or exposing suppliers' employees to undue hazards from the recovered materials."⁸⁰

Subpart 23.4 was adopted to implement section 6002 of the 1976 Resource Conservation and Recovery Act Amendments to the Solid Waste Disposal Act.⁸¹ FAR 23.401(a) requires agencies, when drafting specifications, to ensure they do not exclude

⁷⁸ DEAR 970.5204-62(c).

⁷⁹ DEAR 970.5204-62(a)(22). The same rule applies with respect to a "failure to identify a requirement having the force and effect of law." *Id.*

⁸⁰ FAR 23.403. "Recovered material" means waste materials and by-products which have been recovered or diverted from solid waste including postconsumer material, but . . . does not include those materials and by-products-generated from, and commonly reused within, an original manufacturing process. FAR 23.402.

⁸¹ FAR 23.401 (a). See J. Conrad, *supra* note 41 at 11-26, for a detailed discussion of recovered materials purchasing requirements.

the use of recovered materials, do not require items to be made from virgin materials, and do require, for "EPA designated" items,⁸² the use of recovered materials "to the maximum extent practicable without jeopardizing the intended end use of the item."

The primary obligation placed on contractors by this subpart is to certify, by signing their offer in any solicitation requiring the use of recovered materials, that the percentage of such materials to be used in performing the contract will be at least the amount required by the contract specifications.⁸³ In contracts exceeding the simplified acquisition threshold that are for, or specify the use of, an EPA designated item, contractors must also certify that the percentage of recovered material content used for EPA designated items was at least the amount required by the contract specifications.⁸⁴

2. Ozone-Depleting Substances, FAR Subpart 23.8. The policy of the

⁸² "EPA designated item means an item --) (1) That is or can be made with recovered material; (2) That is listed by EPA in a procurement guideline (40 CFR part 247); and (3) For which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN). Postconsumer material means a material or finished product that has served its intended use and has been diverted or recovered from waste destined for disposal, having completed its life as a consumer item. Postconsumer material is a part of the broader category of 'recovered material'" FAR 23.402 (FAC 97-01, Aug. 22, 1997). The procedures at FAR 23.404 apply to all agency acquisitions of EPA designated items when the price of the item exceeds \$10,000, or the aggregate amount paid for the items, or for functionally equivalent items in the preceding fiscal year was \$10,000 or more. FAR 23.404(a).

⁸³ FAR 23.405(a); FAR 52.223-4, Recovered Material Certification (Oct 1997). See FAC 97-01, August 22, 1997 (amending certification).

⁸⁴ FAR 23.405(b). The Certification clause is FAR 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items (Oct 1997) (FAC 97-01, August 22, 1997). See note 82 *supra* for definition of EPA-designated item.

federal government is that federal agencies “(1) [i]mplement cost-effective programs to minimize the procurement of materials and substances that contribute to the depletion of stratospheric ozone, and (2) [g]ive preference to the procurement of alternative chemicals, products, and manufacturing processes that reduce overall risks to human health and the environment by lessening . . . [ozone depletion].”⁸⁵ Most of the responsibilities in this subpart are placed on the government.⁸⁶ However, contractors may also have contractual obligations with respect to Ozone Depleting Substances (ODSs). For example, in supply contracts, contractors must label, in a particular manner, products which contain or are manufactured with ODSs.⁸⁷ In service contracts which include the “maintenance, repair, or disposal” of any equipment using ODSs as a refrigerant, a contract clause specifically requires compliance with sections 608 and 609 of the Clean Air Act.⁸⁸

3. Toxic Chemical Release Reporting, FAR Subpart 23.9, implements the requirements of Executive Order 12969, “Federal Acquisition and Community Right-to-Know.”⁸⁹ President William J. Clinton issued E.O. 12969 on 8 August, 1995,

⁸⁵ FAR 23.803.

⁸⁶ See FAR 23.803(b) (“In preparing specifications and purchase descriptions, . . . agencies shall ensure that acquisitions: (1) Comply with the requirements of Title VI of the Clean Air Act, Executive Order 12843, and 40 CFR 82.84(a)(2), (3), (4), and (5); and (2) Substitute safe alternatives to ozone-depleting substances . . . to the maximum extent practicable . . .”) (emphasis added).

⁸⁷ FAR 52.223-11(b), Ozone-Depleting Substances.

⁸⁸ FAR 52.223-12, Refrigeration Equipment and Air Conditioners.

⁸⁹ 60 Fed. Reg. 40989 (1995).

to facilitate accomplishment of the goals of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. § 11001 *et seq*), and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. § 13101 *et seq*) with respect to reporting of releases of toxic chemicals into the environment by government contractors.⁹⁰ FAR 23.905 states the government's policy that to the greatest extent possible, federal agencies "shall contract with companies that report in a public manner on toxic chemicals released into the environment." Solicitations for contracts expected to exceed \$100,000 (including all options) must include, as an award eligibility criterion, a certification by the offeror that either (1) it will file and continue to file throughout the contract's life, the Toxic Chemical Release Inventory Form (Form R) for facilities to be used in the performance of the contract that are subject to Form R filing and reporting requirements; or, (2) that the facilities to be used in performance are exempt from Form R filing and reporting requirements.⁹¹ When the solicitation clause is included, the contract clause at 52.223-14, "Toxic Chemical Release Reporting" must be included in the resulting contract, if the contract is expected to exceed \$100,000.⁹² This subpart is inapplicable to acquisitions of commercial items and to contractor

⁹⁰ E.O. 12969, Preamble, and Section 1, Policy, Aug. 8, 1995.

⁹¹ FAR 23.906(a)(1); FAR 23.907(a). Exempt facilities include those that: do not manufacture, process, or use any toxic chemicals listed under § 313(c) of EPCRA; do not have 10 or more full-time employees; do not fall within the Standard Industrial Classification (SIC) Code designations 20 through 39; or, are located outside the United States (See note 93 *infra*). FAR 23.906(a)(2).

⁹² FAR 23.907(b).

facilities located outside the United States.⁹³ If an offeror fails to certify as required by FAR 52.223-13, "Certification of Toxic Chemical Release Reporting," award "shall not be made" to that offeror.⁹⁴ After contract award, if the Environmental Protection Agency (EPA), in carrying out its responsibilities under E.O. 12969,⁹⁵ determines the contractor is not filing the necessary forms with complete information, it may recommend to the head of the contracting activity that the contract be terminated for convenience.⁹⁶ The contracting activity head must then consider EPA's recommendation and determine whether termination or any other action is appropriate.⁹⁷

4. Other Provisions of FAR part 23. FAR subpart 23.2, Energy Conservation, requires agencies to consider "energy conservation and efficiency data," as well as cost and other factors when preparing plans, drawings, specification and other product

⁹³ FAR 23.903(b). "The United States, as used in this subpart, includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction. Id.

⁹⁴ FAR 23.906(c).

⁹⁵ E.O. 12969, section 4-406 gives the EPA Administrator authority to "investigate any subject Federal contractor to determine the adequacy of compliance with the provisions of this order," to hold public or private hearings to assist in compliance determinations, and to recommend contracts be terminated for convenience. Contracting officers must cooperate with EPA representatives and assist them in carrying out their responsibilities under E.O. 12969. FAR 23.906(d).

⁹⁶ FAR 23.906(d); FAR 52.223-14(d).

⁹⁷ Id.

descriptions.⁹⁸ However, it places no affirmative obligations on government contractors. FAR subpart 23.6 requires contractors, prior to the delivery of radioactive material, to notify the contracting officer, who in turn notifies the receiving activities, so appropriate safeguards can be taken.⁹⁹ A contract clause, FAR 52.223-7, Notice of Radioactive Materials, is used to notify contractors of this obligation.¹⁰⁰

⁹⁸ FAR 23.203.

⁹⁹ FAR 23.601.

¹⁰⁰ FAR 23.602.

CHAPTER 2

LIABILITY OF GOVERNMENT CONTRACTORS UNDER THE FALSE CLAIMS ACT

The importance of the certifications discussed above, and of a contractor's contractual obligation to comply with environmental laws becomes readily apparent when considered in light of recent litigation under the False Claims Act.

A. The False Claims Act.

The False Claims Act (FCA)¹⁰¹ has a long history of being used to battle "corruption in the military procurement process."¹⁰² It was originally passed in 1863, during the Civil War, and was "... intended to root out rampant fraud by the contractors that supplied the Union Army."¹⁰³ In 1986, significant changes to the FCA reinvigorated what had become a little-used act.¹⁰⁴ For example, where the old act provided for double damages and forfeitures up to \$2,000, the new act allows treble damages and forfeitures of \$5,000 to \$10,000 per false claim.¹⁰⁵ The old act allowed

¹⁰¹ 31 U.S.C. §§ 3729-3733.

¹⁰² P. Morenberg, *supra* note 22, at 623 (Spring 1995). Mr. Morenberg notes that "[w]hile the FCA targeted defense contractors," it was broad enough to cover any fraud resulting in a financial loss to the federal government. *Id.* at 623 and note 15.

¹⁰³ *Id.* at 623, citing E. Callahan & T. Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 Vill. L. Rev. 273, 302 (1992).

¹⁰⁴ Steve France, *The Private War on Pentagon Fraud*, 76-Mar A.B.A. Journal 46, at 46 (Mar. 1990). Mr. France noted that prior to 1986, DOJ received about six *qui tam* cases annually, while in the first 10 months of 1989, there were 100.

¹⁰⁵ *Id.* at 48.

relators to collect up to 10% of any recovery; the new act allows for at least 15% and up to 30% of any judgment or settlement.¹⁰⁶ Most significantly, however, the 1986 Act made it easier for *qui tam* plaintiff's to initiate FCA suits.¹⁰⁷ Before 1986, if the government had information in its possession, a relator could not sue based on that information, even if the relator provided the information to the government.¹⁰⁸ Now, as long as the information has not been "publicly disclosed" and the Department of Justice has not already initiated a lawsuit, a relator can sue, even if the government has the information.¹⁰⁹

Section 3729(a) of the Act prohibits seven different types of false claims against the government, three of which are particularly relevant in the government contracts arena:

(a) Liability for certain acts. Any person who--

(1) Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

¹⁰⁶ *Id.* at 47.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* See *Hughes Aircraft Co. v. United States ex rel Schumer*, No. 95-1340, slip opinion at 4 (S.Ct. June 16, 1997) (1997 WL 321246) (1986 Amendments allow *qui tam* suits based on information in the government's possession, except where the suit is based on information "publicly disclosed" and was not brought by an "original source" of the information, citing 31 U.S.C. § 3730(e)(4)(A)); Held: 1986 amendment to jurisdictional provision of False Claims Act (FCA) allowing, in certain situations, *qui tam* suits based on information already in the government's possession, does not apply retroactively to contractor's conduct which occurred prior to effective date of amendment).

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . .

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act . . .¹¹⁰

An example of a section (a)(1) violation would be a false or fraudulent termination settlement claim. A contractor submitting falsified supplier invoices to the government to support payment under a cost-reimbursement contract would be an example of a section (a)(2) false claim. The (a)(7) offense has been called a "reverse false claim."¹¹¹

Reverse false claims occur when a person intentionally or negligently omits reporting information, which, if properly reported, could expose the individual to an obligation to the United States (e.g., filing a false Clean Water Act discharge monitoring report intentionally understating the concentration of toxics in industrial effluent so as not to violate a permit).¹¹²

Anyone who makes or presents a false claim is subject to being sued by either the federal government's Department of Justice,¹¹³ or by a private litigant (called a relator)

¹¹⁰ 31 U.S.C. § 3729(a)(1), (2), & (7).

¹¹¹ Kenneth Mattern & Cheryl Nillson, *The Qui Tam Provisions of the FCA and Environmental Noncompliance of Government Contractors*, Fed. Facil. Envtl. J. 23, 26 (Autumn 1996).

¹¹² *Id.*

¹¹³ 31 U.S.C. § 3730(a).

under the statute's *qui tam* provisions.¹¹⁴

B. Federal Government Contracts and the FCA.

As discussed in Chapter 1, government contractors often must make various certifications in the course of submitting bids or proposals (such as the Clean Air and Water Certification), and in performing contracts (such as the Certification of Percentage of Recovered Material Content). One tool contracting officers have to compel contractors to submit these certifications (in fixed-price contracts) is the "Progress Payments" clause.¹¹⁵ This clause requires, as a condition of receiving progress payments, that the contractor "promptly furnish . . . certificates . . . and other pertinent information reasonably requested by the contracting officer for the administration of this clause."¹¹⁶ Failure to comply with this provision, as well as any other "material requirement" of the contract, provides the contracting officer grounds for reducing or suspending progress payments.¹¹⁷

Once a contractor submits the required certifications, it is subject to liability

¹¹⁴ 31 U.S.C. § 3730(b)(1). A *qui tam* action is one "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, . . ." in which " . . . the plaintiff states that he sues *as well* for the state as for himself." BLACK'S LAW DICTIONARY 1126 (5th ed. 1979). See generally, P. Morenberg, *supra* note 22, at 639-646.

¹¹⁵ FAR 52.232-16 (Jul 1991).

¹¹⁶ FAR 52.232-16(g).

¹¹⁷ FAR 52.232-16(c).

under the False Claims Act if those certifications are false.¹¹⁸ As discussed in section 2.A. *supra*, subsections (a)(1), (a)(2), and (a)(7) of the FCA pose particular risks for government contractors who violate environmental laws or regulations. For example, a contractor that signs the Clean Air and Water Certification, and then fails to comply with monitoring or reporting requirements, may be liable for a false certification under the FCA.¹¹⁹ Additionally, as the following discussion will illustrate, FCA liability can flow from both affirmative (express) false statements and implied misrepresentations.

Federal district courts dealing with allegations of false claims under the FCA have held that to support a claim under § 3729(a)(2) of the Act, “some form of affirmative false statement is required.”¹²⁰ However, in Earl O. Pickens v. Kanawha River Towing et al, the District Court for the Southern District of Ohio held that an affirmative statement “is not necessary to state a cause of action under § 3729(a)(1) of the FCA.”¹²¹ The Kanawha court also drew a distinction in cases involving

¹¹⁸ See P. Morenberg, *supra* note 22, at 664.

¹¹⁹ See Earl O. Pickens v. Kanawha River Towing et al, 916 F.Supp. 702 (S.D. Ohio 1996). See also John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L.Rev. 31, 47 (1990) (Recognizing that the “door is open for qui tam suits predicated upon violation of federal environmental statutes,” Mr. Kunich stated: “As a result, both of the twin plagues of DoD, procurement fraud and environmental compliance, may now be brought to the doorstep of the DoJ by qui tam relators.”).

¹²⁰ United States ex rel Fallon v. Accudyne Corp. and Alliant Technosystems, Inc., 921 F.Supp. 611, 627 (W.D. Wisconsin 1995) (*hereinafter Accudyne*). Section 3729(a)(2) of the Act creates liability for any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 U.S.C. § 3729(a)(2).

¹²¹ 916 F.Supp. at 707 (emphasis added), quoting Accudyne, 921 F.Supp at 627: “[A] contractor who knowingly fails to perform a *material requirement* of its contract .

subcontractors on

government contracts, between those situations where the contractor bills the government for the subcontractor's work, and those where it does not.¹²² The court stated that in the latter case, "[t]here cannot be a false claim since the government did not pay for the work allegedly done in violation of the CWA. Accordingly, [the prime contractor] did not cause a false claim [under section 3729(a)(2)] because it never made a claim to the government."¹²³

Additionally, the district courts have examined possible contractor liability for "reverse" false claims under § 3729(a)(7).¹²⁴ The Kanawha case involved allegations of both a false claim under section 3729(a)(2) and a reverse false claim under section 3729(a)(7) against a subcontractor (tugboat operator) on a government lock and dam construction and repair contract. The court in Kanawha held that a reverse false claim

. . . yet seeks or receives payment as if it had fully performed without disclosing the nonperformance, has presented a false claim to the government and may be liable therefor." (emphasis added). The Accudyne court continued: "Applying this principle to the present facts . . . a claim is stated under § 3729(a)(1). Under such a view *the environmental compliance provisions were a material part of those contracts and Accudyne knowingly failed to perform that aspect of the contract, yet sought full payment from the government without disclosing failure to perform.*" Id. (Emphasis added).

¹²² Kanawha, 916 F. Supp. at 707.

¹²³ Id. (distinguishing United States ex rel. Stevens v. McGinnis, No. C-1-93-442 (S.D. Ohio Oct. 26, 1994), 1994 WL 799421) (internal citation omitted).

¹²⁴ 31 U.S.C. § 3729(a)(7) creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." (emphasis added).

under § 3729(a)(7) “requires more than a mere failure to report a violation of another statute . . . the defendant [must] prepare, create or submit some type of statement or record that is false. A failure to report does not count as a statement or record.”¹²⁵ The court then found that the plaintiff had stated a claim under § 3729(a)(7), since the subcontractor defendant tugboat operator’s employees had maintained a vessel log, which plaintiff maintained was false.¹²⁶ Specifically, plaintiff alleged the log excluded entries showing the tugboat discharged its bilge,¹²⁷ containing hazardous substances, into the Ohio River.¹²⁸ The court reasoned that

The vessel’s log is clearly a record. If the log excludes a major event that it ordinarily should contain, the record is a false one. If the government relies upon or otherwise reviews such logs as part of its regulatory role, then the Defendants would have submitted a false report in order to avoid an obligation to the government.¹²⁹

¹²⁵ 916 F.Supp. at 708.

¹²⁶ *Id.*

¹²⁷ “‘Bilge’ means the area in the boat, below a height of 4 inches measured from the lowest point in the boat where liquid can collect when the boat is in its static floating position, except engine rooms. ‘Engine room bilge’ means the area in the engine room or a connected compartment below a height of 12 inches measured from the lowest point where liquid can collect in these compartments when the boat is in its static floating position.” 33 C.F.R. § 183.110.

¹²⁸ 916 F.Supp. at 708-709.

¹²⁹ *Id.* at 708. *See also United States ex rel. Stevens v. McGinnis*, No. C-1-93-442 (S.D. Ohio, Oct. 26, 1994), 1994 WL 799421 (“Genuine issues of material fact exist as to whether defendant McGinnis’ vessel logs deliberately, intentionally and knowingly did not document the illegal transfer and discharges of pollutants into the Ohio River so that McGinnis misrepresented to the Government facts which deprived the Government of money.”). *But see United States ex rel. Praver & Co., et al v. Verrill & Dana, et al*, 946 F. Supp 87 at 95 (D. Maine 1996) (calling both the *Kanawha* and *McGinnis* decisions into question on the basis that neither case discussed “why

Addressing the defendants' argument that the plaintiff had not sufficiently alleged a CWA violation, the court found that defendant's tugboat was regulated by the CWA and that discharges of oil or other hazardous substances from the tugboat's bilge into navigable waters of the United States would violate CWA section § 311(b) (33 U.S.C. § 1321(b)(3)).¹³⁰

1. Contractor's Request for Progress Payment, Standard Form 1443; DD Form 250; and Other Contract Forms.

In United States ex rel Fallon v. Accudyne Corp. and Alliant Technosystems, Inc., the *Qui Tam* relators alleged that the certification made by the contractor on the Standard Form 1443 was an affirmative false statement under § 3729(a)(2) of the Act.¹³¹ Specifically, the relator claimed that Accudyne knowingly failed to comply with environmental compliance provisions contained in its government contracts and made false claims for payment thereunder by implicitly and explicitly representing that it had

[CWA] violations gave rise to an immediate 'obligation' [to pay money to the United States] prior to any judgment. . . .").

¹³⁰ Id. at 708-709.

¹³¹ Accudyne, 921 F.Supp. 611, at 615, 626. The certification language read: "I certify that the above statement (with attachment) has been prepared from the books and records from the above-named contractor in accordance with the contract and instructions hereon, and to the best of my knowledge and belief, that it is correct, that all the costs of contract performance (except herewith reported in writing) have been paid to the extent shown herein, or were [sic] not shown as paid have been paid or will be paid currently by the contractor, when due, in the ordinary course of business, that the work reflected above has been performed, that the quantities and amounts involved are consistent with requirements of the contract." Id. at 616.

complied.¹³² The court found the certification language sufficiently ambiguous to preclude summary judgment, stating “[p]articularly, there is substantial dispute over the scope of the representation made by defendant in the Standard Form 1443 submitted to obtain payment”¹³³ The court found that the agreement could be construed “as nothing more than an affirmation that the billing statement is accurate or might be construed to mean that all aspects of the contract relevant to the claim have been fully performed.”¹³⁴ Where the meaning of the certification language is ambiguous, the court held, the issue is one for the jury.¹³⁵ Following the court’s rulings denying each party’s motion for summary judgment, the case settled, with Accudyne Corporation agreeing to pay \$12 million to the United States.¹³⁶

The Accudyne and Kanahwa cases should be taken as a warning to contractors that allegations that a contractor violated subsections (a)(1), (a)(2), or (a)(7) of FCA

¹³² Id. at 615.

¹³³ Id. at 627.

¹³⁴ Id. at 628.

¹³⁵ Id., citing Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518 (7th Cir. 1989).

¹³⁶ United States ex rel Fallon v. Accudyne Corp., et al., 97 F.3d 937, 938 (7th Cir. 1996). The U.S. agreed to remit 22% (\$2,640,000) of the recovery to the *Qui Tam* relators as compensation for their services. Accudyne agreed to pay relators’ reasonable expenses, attorneys’ fees and costs “in an amount to be determined by the Court” After the district court judge awarded \$1.2 million in fees and costs to the relators, the defendant appealed to the seventh circuit. The court of appeals affirmed the award, and invited the relators to file a statement for reimbursement of their fees and costs incurred in defending the appeal, which the court found relators entitled to collect from Accudyne under both the FCA and the settlement terms. Id. at 941.

section 3729 through noncompliance with environmental requirements may be viable causes of action in the U.S. district courts under the FCA.¹³⁷

The United States Court of Federal Claims has also been receptive to these types of claims.¹³⁸ In a 1997 case, the court found that a contractor violated section 3729(a)(1) of the FCA when it submitted DD Forms 250¹³⁹ in support of payment which indicated that required inspections had been completed, when in fact they had not been done.¹⁴⁰ The court found that the DD Forms 250 had been used as invoices, and thus were claims for payment.¹⁴¹ The contractor argued that absent some "falsity on its face," a DD Form 250 could not constitute a false claim under the False Claims Act.¹⁴²

¹³⁷ See K. Mattern & C. Nillson, *supra* note 111, at 30: "If government contractors are not alarmed by the decisions in *Accudyne* and *Kanahwa*, they are miscalculating the magnitude of risk these cases represent." See also 1995 DEN 142 d21, Daily Env't Rep. (BNA) July 25, 1995 (State Roundup--Wisconsin) (Calling the work Atlantic States Legal Foundation (ASLF) did in the *Accudyne* case "pioneering," ASLF President Samuel H. Sage said "we have our feelers out for similar cases around the country.").

¹³⁸ See note 144 *infra* and cases cited therein.

¹³⁹ Department of Defense (DD) Form 250, Material Inspection and Receiving Report.

¹⁴⁰ BMY-Combat Systems Division of Harsco Corporation v. United States, 38 Fed. Cl. 109, 1997 WL 281358 (Fed.Cl. 1997) (*hereinafter* BMY).

¹⁴¹ BMY, 1997 WL 281358 at 16, *distinguishing United States ex rel Butler v. Hughes Helicopter*, 71 F.3d 321 (9th Cir. 1995) ("The court in *Butler* held that 'where the DD-250s were not used as invoices, and the qui tam plaintiff introduced into evidence no false supporting documents, the DD-250s were not 'claims' under the FCA.'" 71 F.3d at 330.).

¹⁴² *Id.* at 16. See also *Accudyne*, 921 F.Supp. 611, at 620 ("Defendant is generally correct when it asserts that DD-250 Forms are not certifications of the contractor which can be a false statement. United States v. Cannon, 41 F.3d 1462, 1468

However, though the court agreed that the contractor “made no expressly false representations on the DD250 forms,” it found that the contractor’s “implied representations fall into the category of acts that constitute false or fraudulent claims.”¹⁴³ The court noted it previously had held “. . . that for the purposes of the False Claims Act, an *implied* representation on an invoice that work has been completed pursuant to the contract requirements may constitute a false claim for payment.”¹⁴⁴ In order for an implied representation to constitute a FCA violation, the court stated, the government “must prove by a preponderance of the evidence that the plaintiff [contractor] deliberately withheld information.”¹⁴⁵ The implied misrepresentations in this case, according to the court, followed from the contractor’s failure to “identify ‘deficiencies or areas of nonconformances’ upon submission of each DD250 form” to the government as required by the contract.¹⁴⁶ Concluding that the contractor

(11th Cir. 1995). But while a DD-250 may not ordinarily, by itself, constitute a false statement or representation by the contractor, whether a request for payment constitutes a false claim against the government requires a review of the totality of the circumstances. To the extent that the statements supplied on the DD-250 together with other statements and documents and requests for payment had the intended effect of inducing the government to pay claims which were not properly payable they may clearly constitute a false claim within the meaning of § 3729(a)(1).”).

¹⁴³ BMY, 1997 WL 281358, 18.

¹⁴⁴ BMY, at 17 (emphasis added) *citing* Ab-Tech Constr. v. United States, 31 Fed. Cl. 429, 433-34 (1994), *aff’d*, 57 F.3d 1084 (Fed.Cir.1995); Daff v. United States, 31 Fed. Cl. 682, 695 (1994), *aff’d*, 78 F.3d 1566 (Fed.Cir.1996). *Accord*, United States v. U.S. Cartridge Co., 198 F.2d 456 (8th Cir. 1952), *cert. den.*, 345 U.S. 910 (1953).

¹⁴⁵ BMY, at 17, *citing* Daff v. United States, 31 Fed. Cl. 682, 688-89 (1994).

¹⁴⁶ Id. at 15.

deliberately withheld information from the government when it delivered the DD250 forms, that this constituted the submission of false or fraudulent claims, and that the contractor knew its claims were false or fraudulent, the court allowed the government's counterclaim under the FCA.¹⁴⁷

As the false claim allegations in BMY proved viable, so likely would a claim that a contractor failed to comply with environmental requirements of their contracts, yet sought payment as if they had fully complied. Consider, for example, the "Certificate of Conformance,"¹⁴⁸ which is used when authorized in writing by a contracting officer for supplies that would otherwise require an inspection at the source. This certificate states that the supplies or services were furnished "in accordance with all applicable requirements" and "conform in all respects with the contract requirements, including specifications, drawings," In light of the case law discussed above, a contractor who fails, for example, to conduct required monitoring and reporting under the CWA or CAA may potentially be making a false certification by submitting this certificate.¹⁴⁹

¹⁴⁷ Id. at 18, 21. The court's opinion followed a July 1996 trial where only liability, and not quantum, was considered. Id. at 1.

¹⁴⁸ FAR 52.246-15(d).

¹⁴⁹ Of course, the focus is on the "contract requirements," therefor, a contractor can argue that if a particular environmental obligation, such as compliance with the Toxic Substances Control Act, is not specified in the contract, there is no "contract requirement," and thus no FCA liability flows from a failure to comply with that statute. See P. Morenberg, *supra* note 22, at 665. ("False claims may arise from violations of particular environmental laws in cases where contractors have contractually pledged to obey those environmental laws.").

C. Other Potential Applications of the FCA to Combat Environmental Noncompliance.

One author recently catalogued some of the different ways the FCA can be used to “challenge government contractors that harm the environment.”¹⁵⁰ He divided them into two categories: FCA actions against environmental contractors, and FCA actions against defense and other contractors for environmental law violations. In the first category, he listed conduct such as bid-rigging, false socioeconomic certifications, defective pricing, fraudulent invoices and overcharges (*e.g.* for work not done, or done but unnecessary), and substandard performance without informing the government of the deficiencies.¹⁵¹ In the second category, he lists false certifications of CWA and CAA compliance, violations of other environmental laws that a contractor pledged to obey, and fraudulent attempts to bill the government for environmental fines or penalties.¹⁵² Regarding the latter, Mr. Morenberg notes that the FAR expressly categorizes as unallowable fines and penalties resulting from a contractor’s violation of, or failure to comply with, Federal, State, local, or foreign laws and regulations. Thus, he argues, billing the government for their reimbursement may constitute a false claim under the FCA.¹⁵³

The 1986 changes to the FCA have resulted in a virtual explosion of *qui tam*

¹⁵⁰ *Id.* at 657-669.

¹⁵¹ *Id.* at 659-662, *citing* FAR 31.205-15.

¹⁵² *Id.* at 664-668.

¹⁵³ *Id.* at 664, 668.

lawsuits. Statistics released by the Department of Justice in 1995 reveal that in the nine-year period from fiscal year 1987 to fiscal year 1995, there were 1,105 *qui tam* lawsuits filed.¹⁵⁴ The government recovered about \$1.1 billion over that period from *qui tam* litigation.¹⁵⁵ In the coming years, the use of the Act against government contractors that violate environmental laws and regulations is also likely to increase.¹⁵⁶ How successful these suits will be depends in large part on the clauses and provisions contained in, and the certifications required by, the contract being performed, which normally come from the FAR and its supplements.¹⁵⁷ Once government contractors realize the risks these suits, as well as DOJ-initiated suits present, they will see a financial incentive to implement internal environmental compliance and audit

¹⁵⁴ DONALD ARNAVAS & WILLIAM RUBERRY, GOVERNMENT CONTRACTS GUIDEBOOK 7-3 (1994 & Supp. 1996), citing 37 GC ¶ 629. See also Richard C. Reuben, *Blowing the Whistle Louder*, A.B.A. Journal, April 1997, at 38 (Incentives supplied by the 1986 amendments to the FCA caused the number of *qui tam* actions to jump from 33 in 1987 to 360 in 1996).

¹⁵⁵ D. ARNAVAS & W. RUBERRY, *supra* note 154, at 7-3 (Supp. 1996). See also Reuben, *supra* note 154: "Qui tam actions led to nearly \$1.5 billion in recoveries during 1996 alone."

¹⁵⁶ See S. France, *supra* note 104, at 48 (Stating that Bradley Weiss, a former member of the Pentagon Inspector General's office, anticipated in 1990 that private attorneys general would use the FCA to enforce environmental regulations). See also K. Mattern & C. Nillson, *supra* note 111, at 27: "The incentive to file suit under the FCA is real. . . . In fiscal year 1995, 274 *qui tam* relators received over \$379 million, one relator receiving over \$23 million."

¹⁵⁷ See, K. Mattern & C. Nillson, *supra* note 111, at 31: "Another defense to a *qui tam* action is that there is no substantive clause or provision in the contract demanding compliance with the environmental requirement for which the company has been cited as being noncompliant."

programs,¹⁵⁸ which should help ensure their compliance with environmental laws when performing government contracts.¹⁵⁹

¹⁵⁸ Environmental lawyers have been recommending formal corporate compliance and audit programs for some time. See, e.g., Ridgway M. Hall, Jr., & Robert C. Davis, Jr., "Environmental Compliance at Federal Facilities," Briefing Papers No. 88-9, at 192 (Aug. 1988); and Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 Rutgers L. Rev. 605, at 659-662 and accompanying notes (Winter 1995) (Discussing development of corporate environmental compliance programs in the 1980s).

¹⁵⁹ K. Mattern & C. Nillson, *supra* note 111, at 31.

CHAPTER 3

SUSPENSION, DEBARMENT, AND EPA "LISTING"

A. Suspension and Debarment by Contracting Agencies, FAR Subpart 9.4.

Suspension and debarment are administrative actions which are used as a means to carry out the government's policy of dealing only with "responsible" contractors and subcontractors.¹⁶⁰ They have been described as being "among the most aggressive enforcement mechanisms available to a Federal Government agency that has been the victim of either illegal or irresponsible behavior by a contractor."¹⁶¹ Subpart 9.4 of the FAR sets out the grounds for suspension and debarment, and the procedures which agencies must follow in taking these actions.¹⁶² The Federal Acquisition Streamlining Act of 1994 and implementing changes to the FAR increased the potency of this enforcement tool by imposing a reciprocity requirement, so that a suspension or debarment by one executive agency must now be recognized as such by all other executive agencies.¹⁶³ Debarment or suspension extends to all "divisions or other organizational elements of the contractor, unless the debarment decision is limited by

¹⁶⁰ FAR 9.402(a).

¹⁶¹ D. ARNAVAS & W. RUBERRY, GOVERNMENT CONTRACTS GUIDEBOOK 7-19 (1994).

¹⁶² FAR 9.400 - 9.409. *See generally*, Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 Cath. U.L. Rev. 363 (1995).

¹⁶³ Public Law 103-355, Section 2455 (31 U.S.C. § 6101, note); FAR 9.401. *See* 60 Fed. Reg. 33064 (1995) (Final rule, June 26, 1995) (Noting that as early as August 1989, there had been an effort to impose a reciprocity requirement by Executive Order (E.O. 12689, Aug. 16, 1989).

its terms to specific divisions, organizational elements, or commodities.”¹⁶⁴ The debarring or suspending official may extend the debarment or suspension to affiliates of a contractor, provided they are named and given written notice and an opportunity to respond.¹⁶⁵ Suspension and debarment are discretionary actions, to be imposed “. . . only in the public interest for the Government’s protection and not for purposes of punishment.”¹⁶⁶ The General Services Administration maintains a list of all contractors suspended, debarred, proposed for debarment, or declared ineligible by agencies or the General Accounting Office.¹⁶⁷ Contracting officers must check this list at various points in the procurement process, including immediately before contract award.¹⁶⁸

1. Suspension. An agency’s suspending official may suspend a contractor based on “adequate evidence”¹⁶⁹ of a variety of misconduct, including:

- (1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;
- (2) Violation of Federal or State antitrust statutes relating to submission of offers;
- (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

¹⁶⁴ FAR 9.406-1(b); 9.407-1(c).

¹⁶⁵ *Id.*

¹⁶⁶ FAR 9.402, Policy. *But see* note 180 *infra*.

¹⁶⁷ FAR 9.404.

¹⁶⁸ FAR 9.405(d)(1) & (d)(4).

¹⁶⁹ “Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.” FAR 9.403.

- (4) Violations of the Drug-Free Workplace Act of 1988 . . . ;
- (5) Intentionally affixing a label bearing a "Made in America" inscription . . . to a product sold in or shipped to the United States, when the product was not made in the United States . . . ;
- (6) Commission of an unfair trade practice . . . ; or
- (7) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.¹⁷⁰

Notably absent from this list is any provision directly authorizing suspension for violations, even repeated violations, of environmental laws.¹⁷¹ The Department of Defense has in the past asserted that criminal violations of environmental statutes other than the CAA and CWA showed a "lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor . . .," and initiated debarment proceedings for the violations.¹⁷² In the case where it might be difficult to allege that a particular serious environmental violation indicated a lack of business honesty or integrity, a suspending official could attempt to rely on FAR 9.407-2(c), which authorizes suspension ". . . for any other cause of so serious or compelling a nature" that it affects the contractor's present responsibility.¹⁷³

¹⁷⁰ FAR 9.407-2(a).

¹⁷¹ *But see* the discussion at pages 53-58 *infra* on EPA Listing for contractors convicted of violating the CAA or CWA.

¹⁷² R. Hall, Jr. & R. Davis, Jr., *supra* note 158, at 187. *Accord*, W. Jay DeVecchio & Devon Engel, *EPA Suspension, Debarment, and Listing: What EPA Contractors Can Learn from the Defense Industry (and Vice Versa)*, 22 Pub. Cont. L.J. 55, 76 (Fall, 1992); Milo Mason & Paul Smyth, *Toward Fully Understood Compliance: Knowing Enforcement Mechanisms*, 8-SPG Nat. Resources & Env't 3, 53 (Spring 1994).

¹⁷³ FAR 9.407-2(c). *See also* FAR 9.406-2(c); DEAR 909.406-2(c).

Indictment for any one of the listed offenses constitutes “adequate evidence” for suspension.¹⁷⁴ The FAR cautions, however, that “[s]uspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government’s interests.” Section 9.407-1 states that the existence of grounds for suspension does not necessarily require suspension, and advises suspending officials what they should, and can, consider. For example, the official “should” consider how much evidence is available, how credible it is, and the seriousness of the contractor’s alleged acts or omissions; and “may” consider remedial measures or mitigating factors, though they are not required to.¹⁷⁵ The procedures the government must follow to suspend a contractor are set out in FAR 9.407-3.

Once a contractor is suspended, the period of suspension “shall be for a temporary period pending the completion of any investigation and any ensuing legal proceedings, unless sooner terminated”¹⁷⁶ However, if no legal proceedings are initiated within 12 months of the date of the suspension notice, the suspension must be terminated unless an Assistant Attorney General requests an extension.¹⁷⁷ Contractors are not entitled to pre-suspension notice, but they do have 30 days after receiving the

¹⁷⁴ FAR 9.407-2(b).

¹⁷⁵ FAR 9.407-1(b).

¹⁷⁶ FAR 9.407-4.

¹⁷⁷ *Id.* A six month extension can be granted. A suspension cannot be extended beyond a total of 18 months unless legal proceedings are initiated during those 18 months, in which case the suspension continues until the proceedings conclude.

notice to submit information in opposition to the suspension.¹⁷⁸ The consequences of suspension, like debarment, are far-reaching; the contractor may not: be solicited by government procurement agencies, receive contracts, be a subcontractor on a government contract, act as agents or representatives for other contractors, or be a surety on a government contract.¹⁷⁹

2. Debarment. Debarment is more serious than suspension, and is for a set period of time "commensurate with the seriousness of the causes," which normally should not exceed 3 years.¹⁸⁰ The evidentiary standard for a debarment action is also higher: either a conviction or civil judgment for certain violations of procurement, or other statutes, or proof, by a "preponderance of the evidence," that the contractor engaged in one of various types of misconduct, is required.¹⁸¹

A conviction or civil judgment for any of the following is cause for debarment: "[c]ommission of fraud in connection with obtaining, attempting to obtain, or performing a public contract . . . ; . . . embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; . . . [and] [c]ommission of any other offense indicating a lack

¹⁷⁸ FAR 9.407-3.

¹⁷⁹ FAR 9.405, Effect of Listing.

¹⁸⁰ FAR 9.406-4. *But see* W. J. DeVecchio & D. Engel, *supra* note 172, at 70 (Noting that the EPA has sought longer periods of debarment, including fifteen-year debarments for contractors convicted of dumping medical waste; and noting that "[s]uch extreme action appears designed to emphasize punishment, rather than to ensure present responsibility.").

¹⁸¹ FAR 9.406-2.

of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”¹⁸²

The following types of conduct, if shown by a preponderance of the evidence, constitute grounds for debarment:

- (i) Violation of the terms of a government contract or subcontract, so serious as to justify debarment, such as: (A) Willful failure to perform in accordance with one or more contracts; or (B) a history of failure to perform, or unsatisfactory performance of, one or more contracts.
- (ii) Violations of the Drug-Free Workplace Act of 1988 . . .
- (iii) Intentionally affixing a [“Made in America” label to a product not made in the United States].
- (iv) commission of an unfair trade practice . . . ¹⁸³

Additionally, if the Attorney General of the United States or her designee determines a contractor is “not in compliance with Immigration and Naturalization Act employment provisions,” the debarring official may debar the contractor.¹⁸⁴ Finally, FAR 9.406-2 includes the catch-all language permitting debarment for “[a]ny cause of so serious or compelling a nature that it affects the present responsibility of” a contractor.¹⁸⁵

However, like the suspension provisions, the regulations do not expressly provide for debarment for criminal convictions or civil judgments for violations of

¹⁸² FAR 9.406-2(a). Other examples include violation of Federal or State antitrust statutes regarding submission of offers, and intentionally affixing a “Made in America” label to a product not made in the United States.

¹⁸³ FAR 9.406-2(b).

¹⁸⁴ FAR 9.406-2(b)(2) (The Attorney General’s decision is not reviewable in subsequent debarment proceedings). *Id.*

¹⁸⁵ FAR 9.406-2(c).

environmental laws or regulations, a weakness recognized by environmental law practitioners years ago.¹⁸⁶ Perhaps most ironic is the fact that not even the Environmental Protection Agency's suspension and debarment regulations for nonprocurement programs expressly authorize such action for environmental law violations.¹⁸⁷

The debarring official is provided a lengthy list of factors he or she should consider at FAR 9.406-1 before deciding whether debarment is in the government's interest. For example, the debarring official should consider whether the contractor: had effective internal control systems in place at the time of the questioned conduct, timely brought the conduct cited as the reason for debarment to the government's attention, cooperated with the government during the investigation and subsequent court or administrative action, paid or agreed to pay all fines, penalties, and so forth, including investigative expenses; took disciplinary actions against individuals responsible for the conduct which is grounds for debarment, or implemented or agreed to implement remedial measures.¹⁸⁸

The procedures for debarment actions are set out in FAR 9.406-3. The contractor has more procedural rights in this action than in a suspension action, including a right to receive a notice of *proposed* debarment, prior to actual

¹⁸⁶ See James Strock & Brian Runkel, *Environmental Bad Actors and Federal Disqualification*, 15 Harv. Envtl. L. Rev. 529, 540 (1991).

¹⁸⁷ 40 C.F.R. § 32.110; 40 C.F.R. § 32.405.

¹⁸⁸ FAR 9.406-1(a).

debarment.¹⁸⁹ The contractor then gets 30 days to “submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.”¹⁹⁰ Unless the proposed debarment is based on a conviction or civil judgment, a contractor whose submission “raises a genuine dispute over facts material to the proposed debarment” is also entitled to a hearing, where it may appear with counsel, submit documentary evidence, present witnesses, and confront agency witnesses.¹⁹¹ Finally, agencies must make a transcribed record of the proceedings and make it available at cost to the contractor, upon request.¹⁹²

Used properly, the power to suspend and debar contractors gives agencies a large “stick” to hold over contractors’ heads to encourage compliance with a variety of laws and their contracts.¹⁹³ However, as discussed in Chapter 5 *infra*, more can be done to increase the ability of these mechanisms to ensure compliance with environmental laws.

B. EPA Contractor “Listing” Program.

1. Overview. The authority for the EPA’s Listing program is found in section

¹⁸⁹ FAR 9.406-3(c).

¹⁹⁰ *Id.*

¹⁹¹ FAR 9.406-3(b)(2).

¹⁹² *Id.* The requirement for a transcript may be waived by mutual agreement of the contractor and the agency. *Id.*

¹⁹³ W. J. Devecchio & D. Engel, *supra* note 172 at 55 (Describing EPA’s power to debar or suspend EPA contractors as “enormously coercive”).

306 of the Clean Air Act and section 508 of the Clean Water Act.¹⁹⁴ The CWA

provision provides that:

No federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.¹⁹⁵

The CAA provision is similar, although it also provides that the EPA Administrator may, in his or her discretion, extend the ineligibility to other facilities the convicted person owned or operated.¹⁹⁶ The regulations implementing the listing program, as well as EPA's suspension and debarment procedures for nonprocurement programs, are at 40 C.F.R. Part 32. The regulations define "CAA or CWA ineligibility" as follows:

CAA or CWA ineligibility. The status of a facility which, as provided in section 306 of the Clean Air Act (CAA) and section 508 of the Clean Water Act (CWA), is ineligible to be used in the performance of a Federal contract, subcontract, loan, assistance award or covered transaction. Such ineligibility commences upon conviction of a facility owner, lessee, or supervisor for a violation of section 113 of the CAA or section 309(c) of the CWA, which violation occurred at the facility. The ineligibility of the facility continues until such time as the EPA Debarring Official certifies that the condition giving rise to the CAA or CWA criminal conviction has been corrected.¹⁹⁷

This is known as "mandatory listing," as the EPA Administrator has no discretion to not

¹⁹⁴ 42 U.S.C. § 7606; 33 U.S.C. § 1368.

¹⁹⁵ 33 U.S.C. § 1368.

¹⁹⁶ 42 U.S.C. § 7606(a).

¹⁹⁷ 40 C.F.R. § 32.105.

list a facility once a facility owner, lessee, or supervisor is convicted of a covered offense under either statute, and the offense occurred at the facility.¹⁹⁸

“Facility” is defined as

Any building, plant, installation, structure, mine, vessel, floating craft, location or site of operations at which, or from which, a Federal contract, subcontract, loan, assistance award or covered transaction is to be performed. Where a location or site of operations contains or includes more than one building, plant, installation or structure, the entire location or site shall be deemed the facility unless otherwise limited by EPA.¹⁹⁹

Once declared CWA or CAA ineligible, the facility is listed on the “List of Parties Excluded from Federal Procurement and Nonprocurement Programs,” maintained by the GSA,²⁰⁰ and federal agencies “shall not” use the facility in the performance of “any Federal contract, subcontract, loan, assistance award or covered transaction.”²⁰¹ Unless EPA uses its discretionary authority under the CAA to declare other facilities ineligible, the scope of listing is facility-specific, which makes listing more narrow than debarment and suspension, which can affect an entire an company.²⁰² Listed facilities remain ineligible until the EPA Debarring Official “certifies that the condition giving rise to the CAA or CWA criminal conviction has been corrected.”²⁰³

¹⁹⁸ *Id.* See also, 42 U.S.C. § 7606; 33 U.S.C. § 1368.

¹⁹⁹ *Id.*

²⁰⁰ 40 C.F.R. § 32.500(a).

²⁰¹ 40 C.F.R. § 32.110(d).

²⁰² J. DeVecchio & D. Engel, *supra* note 172, at 58.

²⁰³ 40 C.F.R. §§ 32.105, 32.321.

2. Shortcomings of the Listing Program. Mandatory listing occurs only upon conviction of certain violations of only two environmental statutes, the CAA and CWA. Additionally, under the CWA, only the violating facility is listed.²⁰⁴ When the CAA was amended in 1990 to allow the EPA Administrator to extend the ineligibility to other facilities owned by the person(s) convicted, two authors predicted that it was “an omen of things to come,” and opined that it was “likely that the listing sanction will be added to environmental statutes other than the CWA and CAA.”²⁰⁵ Perhaps unfortunately, time has so far proven them wrong.²⁰⁶

While listing is “mandatory” for convictions under the specified CAA and CWA sections, shrewd defense lawyers may try to work out plea agreements that allow clients to plead to an offense that does not require listing. The case of Southern Dredging Company Inc. v. United States,²⁰⁷ provides an excellent example of this. In February 1988, two employees of Southern Dredging illegally dumped several tons of dredged material from the Cherokee, Southern’s dredge, into the Copper River, a navigable water of the United States.²⁰⁸ Southern Dredging initially pled guilty to a criminal violation of the CWA, but withdrew its plea “after the Environmental Protection

²⁰⁴ 33 U.S.C. § 1368 (CWA § 508).

²⁰⁵ J. DeVecchio & D. Engel, *supra* note 172, at 59.

²⁰⁶ See 40 C.F.R. §§ 32.100, 32.105

²⁰⁷ 833 F.Supp. 555 (Dist. S.C. 1993).

²⁰⁸ *Id.* at 556; Southern Dredging Company, Inc. v. United States, 96 F.3d 1439 (4th Cir. 1996) 1996 WL 516158 at 1 (Unpublished Decision).

Agency (EPA) placed it on a list of violating facilities, which meant that it could not contract with government agencies.”²⁰⁹ It then entered another plea agreement, and pled guilty to misdemeanor violations of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. sections 407 and 411.²¹⁰ Of course, EPA Listing is not authorized for misdemeanor convictions under the Rivers and Harbors Act. Nevertheless, relying on the employees’ convictions under the CWA, the EPA placed Southern’s dredge Cherokee on its list of violating facilities.²¹¹ The two employees had been convicted of violating CWA sections 311 and 319.²¹² Southern Dredging then successfully challenged its listing in a motion for summary judgment. The U.S. District Court for the district of South Carolina held that since Southern Dredging was not convicted of any offense under the CWA, the EPA “improperly applied the mandatory listing procedures . . . to place the dredge Cherokee on the List of Violating Facilities.”²¹³ The court found the statutory language of CWA section 508 was clear, and required that the “entity with which the government seeks to contract” be convicted of a CWA offense before the threshold for mandatory listing could be met.²¹⁴ Since Southern Dredging

²⁰⁹ 1996 WL 516158 at 1, *citing* CWA § 508(a), 33 U.S.C. § 1368(a); 40 C.F.R. § 15.10.

²¹⁰ *Id.*

²¹¹ 833 F.Supp. 555, 556.

²¹² *Id.*

²¹³ *Id.* at 559, *vacated on other grounds and remanded*, 35 F.3d 557 (4th Cir. 1994).

²¹⁴ *Id.* at 558.

had not been convicted under the CWA, there was “no statutory authority for using the mandatory listing procedure to prohibit the award of federal contracts to Southern based on its use of the Cherokee.”²¹⁵ The Fourth Circuit Court of Appeals vacated and remanded, asking that the District Court consider the effect of the second plea agreement on EPA’s listing of the Cherokee.²¹⁶ On remand, the District Court dismissed the case as moot, because the time period for the Cherokee’s listing had expired.²¹⁷ Although ultimately the listing period expired before Southern Dredging could get a final ruling on the propriety of the Cherokee’s listing, the case provides some insight into how listing can be avoided. If a defense attorney can negotiate a plea to an offense that does not carry with it mandatory EPA listing, they may be able to save their client from the potentially devastating consequences of mandatory listing.²¹⁸

Another potential weakness of the suspension, debarment, and listing sanctions is that no clause in government contracts puts contractors on notice of them. This raises the issue of whether the sanctions adequately deter noncompliance with laws, regulations, and contract provisions. Two authors writing on the subject of compliance in 1994 stated:

²¹⁵ *Id.* at 559.

²¹⁶ 1996 WL 516158 at 2.

²¹⁷ *Id.*

²¹⁸ DeVecchio & Engel, *supra* note 172, at 78 (“Counsel [for contractors] must bear in mind the consequences of suspension and debarment -- which frequently have a greater impact than a criminal penalty -- and must vigorously pursue strategies to resolve a potential suspension or debarment concurrent with resolution of a criminal proceeding.”).

Advertising the law and the punishment serves several purposes in an enforcement scheme. Too often we lawyers start at the point of penalties when thinking about an enforcement scheme. But for an enforcement scheme to work, advertising of the prohibition and punishment is as crucial a part or mechanism in enforcement as the punishment. . . . The constant reminder or advertisement of what is the law may cause more compliance than all the punishment we can mete out.²¹⁹

The smaller, newer government contractor may be unaware of these sanctions.

However, the provisions of the FAR, and the extensive literature on the subject should have put larger and more experienced government contractors sufficiently on notice of these risks to their government business.²²⁰ For example, the Clean Air and Water Certification discussed in Chapter 1 should give contractors pause if they don't know what EPA's "List of Violating Facilities" is. Additionally, articles in newspapers²²¹ and legal periodicals²²² have helped publicize the ability of the government to suspend, debar, or list contractors. In their article *When EPA Wants You Gone*, Joan Sasine and

²¹⁹ M. Mason & P. Smyth, *supra* note 172, at 5.

²²⁰ See generally, JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 435-448 (Draft Manuscript, 1996); R. Hall & R. Davis, *supra* note 158, at 186-187; Dembling, *Debarment and Suspension*, Briefing Papers 78-6 (Dec. 1978), 4 BPC 257; Johnson & DeVecchio, *Debarment and Suspension Ed. II*, Briefing Papers 83-9 (Sep. 1983), 6 BPC 223; Toomey, Fisher & Shapiro, *Debarment and Suspension Ed. III*, Briefing Papers 89-4 (Mar. 1989), 8 BPC 329; and *Environmental Issues in Government Contracting*, Topical Issues in Procurement Series (T.I.P.S.) at 10 (June 1990).

²²¹ Mark Lacey, *Federal Listing Puts Squeeze on Contract Rogues; Crime; Numerous Valley Firms join others barred from doing business with Uncle Sam due to fraud, bribery or other offenses*, L.A. Times, Feb. 12, 1996, (Metro, Part B) at 1.

²²² Joan Sasine & Kimberly C. Harris, *When EPA Wants You Gone*, Legal Times, Jun. 17, 1996, at S38.

Kimberly Harris note an increase in the use of debarment, suspension, and "listing" by federal agencies, especially the EPA.²²³ They go on to state that the result "has been that most contractors of substantial size have established companywide codes of conduct articulating the fundamental do's and don'ts of government business."²²⁴ Thus, it appears "the word" on these powerful sanctions is getting out, at least to the larger contractors.

Finally, the reluctance of some agencies to initiate debarment proceedings, even where seemingly called for, is a weakness of the debarment sanction. Author W. Noel Keyes recently commented that "agencies for some reason are often fearful of commencing debarment proceedings."²²⁵ Mr. Keyes cited Leslie and Elliot Company v. Garrett,²²⁶ where despite the Navy contracting officer's suspicion of fraud or dishonesty by the contractor on previous contracts, no debarment action was initiated.²²⁷

²²³ Id. at S39. According to the authors, "[s]ince 1991, the EPA has instituted more government-wide debarment actions under the Federal Acquisition Regulation (FAR) than any other civilian agency." Id. at S38.

²²⁴ Id.

²²⁵ W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 9.47 (1986 & 1994 Pocket Part). *Cf.* TJAGSA Practice Notes, *Contract Law Notes*, The Army Lawyer, DA Pamphlet 27-50-251, October 1993 at 40 ("[T]he government often is reluctant to terminate for default even when circumstances permit." (citation omitted)).

²²⁶ 732 F.Supp. 191 (D.D.C. 1990).

²²⁷ Id. at 197: "Moreover, the Determination and Findings raises a suggestion of fraud and/or dishonesty in plaintiff's dealings with the government. Under such circumstances one must wonder why the plaintiff was not the subject of debarment proceedings."

Ultimately, the court found a *de facto* debarment, and ordered the Navy to conduct debarment hearings using the appropriate procedural safeguards.²²⁸

While useful tools, the suspension and debarment provisions of the FAR, as well as EPA's Contractor Listing program, can be strengthened to provide for greater environmental compliance by government contractors. This author's suggestions in that regard are discussed in Chapter 5 *infra*.

²²⁸ *Id.*

CHAPTER 4

MISCELLANEOUS FAR PROVISIONS AND CLAUSES

A. Termination for Default Clauses.

The FAR contains several different “default” clauses, and the type of contract will dictate which one will be used.²²⁹ It may be possible to utilize termination for default against a contractor violating environmental laws or regulations, or contract requirements.²³⁰ The clause for fixed price supply and services contracts is at FAR 52.249-8. It provides that the government may, by written notice to the contractor, terminate the contract in whole or in part if the contractor fails to:

- (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
- (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
- (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).²³¹

The reference in (ii) and (iii) above to “subparagraph (a)(2) below” is to the cure notice requirement; contractors must be given notice and 10 days (or more if authorized

²²⁹ FAR sections 52.249-8, 52.249-9, and 52.249-10. *See also* FAR 52.249-6 and 52.249-7.

²³⁰ *See, J. Parr Construction & Design, Inc. v. United States*, 24 Cl. Ct. 228, 229 (1991), *aff'd per curiam*, 996 F.2d 319 (Fed. Cir. 1993). *Cf. Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173, 1176 (1994) (“[E]ven though these [labor] reporting standards are not related to contract performance, failure to comply with federal labor standards may justify a default termination.”).

²³¹ FAR 52.249-8, Default (Fixed-Price Supply and Services) (Apr 1984). The clause for fixed-price research and development contracts, FAR 52.249-9, states essentially the same three grounds for default termination.

by the contracting officer) to cure the default.

Contracting personnel can use subparagraph (iii), failure to perform "other provisions" of the contract, as a basis for default termination where a contract contains environmental compliance requirements which the contractor clearly is not meeting. Provided the environmental requirement violated is found to be a "material requirement" or "material provision" of the contract, such a default termination will almost certainly be upheld.²³² Professor John Cibinic, Jr. has stated the requirement in these terms: "It has generally been thought that the failure to perform 'other provisions' must rise to the level of a 'material breach' of contract to sustain a default termination."²³³

A termination for default for failure to comply with "other [environmental] provisions" may even be upheld *absent* a finding that the environmental requirement was a material one. In the April 1994 Nash and Cibinic Report, Professor Cibinic discussed the case of Kelso v. Kirk Brothers Mechanical Contractors Inc.,²³⁴ which

²³² *Brandywine Prosthetic Serv., Ltd.*, 93-1 BCA ¶ 25,250, VABCA No. 3441 (1993) (Government must establish contractor breached a material provision of the contract and that the contractor has been given a chance to cure its breach). Cf. United States ex rel. Fallon et al v. Accudyne Corp., 921 F.Supp. 611, 617-18 (W.D. Wis. 1995) (holding, in context of False Claims Act, that environmental compliance provisions (relating to hazardous waste handling and disposal and Clean Air Act and Clean Water Act compliance) of contract were "a material part of those contracts.")

²³³ John Cibinic, Jr., *Default Termination for Failure to Comply with "Other Provisions": Requiring Contractors to do the Complete Job*, 8 Nash and Cibinic Report, Vol 4, at 63 (Apr. 1994), citing *Brandywine Prosthetic-Orthotic Svc., Ltd.*, 93-1 BCA ¶ 25,250, VABCA No. 3441 (1992).

²³⁴ 16 F. 3d 1173 (Fed. Cir. 1994).

Professor Cibinic wrote, “raises some doubt concerning” the materiality requirement.²³⁵

In Kelso, the U.S. Court of Appeals for the Federal Circuit determined clauses in Kirk Brothers Mechanical’s contract with the Navy requiring it to maintain pay records and employee time-cards were “not mere technicalities,” and held that failure to maintain the records was grounds for termination.²³⁶ In doing so, the court overruled a divided Armed Services Board of Contract Appeals decision converting the termination for default into one for the convenience of the government.²³⁷ However, as Professor Cibinic noted, the court “did not discuss, or even mention, the materiality requirement.”²³⁸ This may be because the court was not analyzing the termination under the “fails to comply with any other provision” language of the services/supply default clause. Instead, it was dealing with a construction contract containing the clause found at FAR 52.222-12, “Contract Termination -- Debarment.” As Professor Cibinic himself noted, this is “an omnibus clause dealing with termination for failure to comply with the numerous labor provisions applicable to construction contracts.”²³⁹

Additionally, FAR 52-249-8(i), authorizing termination for failure to timely deliver the supplies or perform the services, has been interpreted to allow termination

²³⁵ J. Cibinic, *supra* note 233, at 63.

²³⁶ 16 F.3d 1173, 1176.

²³⁷ 16 F.3d 1173, 1177.

²³⁸ J. Cibinic, *supra* note 233, at 62.

²³⁹ Id.

for (1) failure to deliver on the date specified in the contract, or (2) failure to comply with contract specifications.²⁴⁰ If environmental requirements are set out as contract specifications, then failure to comply with them should establish a separate basis for default termination under FAR 52.249-8(i).

Default termination for a construction contractor not meeting environmental requirements may be more problematic under the Default (Fixed-Price Construction) clause.²⁴¹ It authorizes default termination of all or a separable part of the work in the event the contractor "refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time"²⁴² Unlike the fixed-price supply and services, and the research and development (R & D) default clauses, the construction contract default clause does not authorize termination for "failure to perform any of the other provisions of this contract." Therefore, unless the environmental work constitutes a "separable part" of the contract, it appears it would be harder to argue that a failure to comply with environmental laws or regulations by itself is sufficient grounds for default termination under the Default, (Fixed-Price Construction) clause.

²⁴⁰ D. ARNAVAS & W. RUBERRY, *supra* note 154, at 16-6 (1994).

²⁴¹ FAR 52.249-10. According to authors Donald Arnavas and William Ruberry, "[t]erminations for default are much more common in supply contracts than in construction contracts." ARNAVAS & RUBERRY, *GOVERNMENT CONTRACTS GUIDEBOOK* 16-6 (1994).

²⁴² FAR 52.249-10(a).

In the April 1994 edition of the "Nash and Cibinic Report," Professor John Cibinic, Jr. discussed the distinction between the different default termination clauses.²⁴³ Professor Cibinic noted that the absence of the reference to termination for failure to comply with "other provisions" in the fixed-price construction contract clause has led some to question whether the government can terminate for such a failure, absent some other clause. Discussing *Engineering Technology Consultants, S.A.*,²⁴⁴ Professor Cibinic stated the ASBCA "... appeared to reach the conclusion that the construction contract 'Default' clause does not authorize a termination for failure to perform other provisions."²⁴⁵ However, the board found the contractor's failure to obtain insurance (the contract provision violated) gave the government no alternative but to stop work, and at this point, the contractor was "unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period."²⁴⁶ Professor Cibinic surmised that "[a]pparently, the board was of the opinion that the failure to perform another provision must impact the performance of the work to justify termination under the construction contract 'Default' clause."²⁴⁷

However, the United States Claims Court in J. Parr Construction & Design, Inc. v. United States, held, without extensive discussion, that a failure to comply with

²⁴³ J. Cibinic, *supra* note 233, at 61-64.

²⁴⁴ 36 GC ¶ 74, ASBCA No. 43454 (Dec. 1993).

²⁴⁵ J. Cibinic, *supra* note 233, at 62.

²⁴⁶ *Id.*, quoting *Engineering Technology Consultants, S.A.*, 36 GC ¶ 74.

²⁴⁷ J. Cibinic, *supra* note 233, at 62.

environmental regulations *alone* was adequate grounds for a default termination.²⁴⁸ In that case, the work site was a lighthouse on Chandeleur Island, an uninhabited island off the coast of Louisiana in the Gulf of Mexico.²⁴⁹ The island is part of the Breton National Wildlife Refuge.²⁵⁰ Federal Regulations at 50 C.F.R. § 27.94 required that garbage on the refuge be disposed of properly.²⁵¹ Parr, in violation of the regulations, buried garbage generated during contract performance in shallow pits on the island, and allowed paint to spill onto the sand.²⁵² Mr. Parris, Parr's president, argued that the government didn't tell him the island was part of a wildlife refuge.²⁵³ The Claims Court found the argument irrelevant, concluding that "Parr had the responsibility to determine

²⁴⁸ 24 Cl. Ct. 228, 229 (1991), *aff'd per curiam*, 996 F.2d 319 (Fed. Cir. 1993).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 238.

²⁵² *Id.* The regulation provides:

(a) The littering, disposing, or dumping in any manner of garbage, refuse sewage, sludge, earth, rocks, or other debris on any national wildlife refuge except at points or locations designated by the refuge manager, or the draining or dumping of oil, acids, pesticide wastes, poisons, or any other types of chemical wastes in, or otherwise polluting any waters, water holes, streams or other areas within any national wildlife refuge is prohibited.

(b) Persons using a national wildlife refuge shall comply with the sanitary requirements established under the provisions of this Subchapter C for each individual refuge; the sanitation provisions which may be included in leases, agreements, or use permits, and all applicable Federal and State laws.

²⁵³ 24 Cl. Ct. at 238.

the status of the island.”²⁵⁴ The court found that “. . . the termination decision was justified on at least three *separate bases*: abandonment, poor work quality, and environmental violations,”²⁵⁵ and dismissed Parr’s complaint seeking conversion of the default termination into a termination for convenience.²⁵⁶ While the Parr court did not express why it determined Parr had the responsibility to determine the status of the island, it was likely influenced by the Permits and Responsibilities clause,²⁵⁷ used in fixed-price construction contracts.

The Parr case illustrates the willingness of at least some courts to “hold contractors feet to the fire” when it comes to environmental compliance, even in the absence of contract clauses specifically requiring compliance.²⁵⁸

Conversely, the lack of clear contract requirements or direction from the government can result in a contractor avoiding liability for environmental violations. For example, the Armed Service Board of Contract Appeals refused to uphold a contracting officer’s decision holding a contractor liable for half of the cost of a mitigation project by MacDill Air Force Base (AFB) that was part of a consent

²⁵⁴ Id.

²⁵⁵ Id. at 229 (emphasis added).

²⁵⁶ Id. at 239

²⁵⁷ FAR 52.236-7.

²⁵⁸ While a contract specification did require removal of debris, the court, in finding violation of environmental regulations a grounds for default termination, did not rely on the specification, but on the contractor’s violation of 50 C.F.R. § 27.94. Id. at 238.

decree.²⁵⁹ The consent decree resolved the State of Florida's allegations of Clean Water Act wetlands violations by MacDill AFB related to golf course construction by the contractor.²⁶⁰ The Board noted that the tidal ditches which the contractor illegally filled without a CWA permit were not marked on the contract drawings and were not staked out at the site.²⁶¹ The Board was unpersuaded by the government's arguments that the tidal ditches were "obvious environmentally sensitive areas," and refused to hold Maitland Brothers responsible for any of the mitigation costs incurred by the Air Force.²⁶²

The Board was also unpersuaded by the agency's conclusion (set out in a final contracting officer's decision) that the contractor shared responsibility for the environmental violations with the agency because the "Permits and Responsibilities" clause of its contract placed the obligation on the contractor to "obtain all permits," which it had not done.²⁶³ Instead, the Board found that under Florida law it was the **government's** obligation, as the property **owner**, to obtain the necessary permits for

²⁵⁹ *Maitland Bros. Co. and St. Paul Fire and Marine Insurance Company*, 90-1 BCA 22,367, ASBCA No. 32,605 (1989).

²⁶⁰ *Id.*

²⁶¹ *Id.* (1989 WL 123707, at 35)

²⁶² *Id.*

²⁶³ *Id.* (1989 WL 123707, at 25). The clause the contracting officer relied on was DAR 7-602.13, "Permits and Responsibilities." *Id.*

work in environmentally sensitive areas.²⁶⁴ The Board found that the government's failure to obtain the necessary permits prior to awarding the contract caused construction delays and substantial expense to the government for the mitigation project required by the State of Florida.²⁶⁵ Considering the outcome, it is likely that had the government terminated the contractor for default for the wetlands or permit law violations, such action would have been overturned.

In addition to the standard default clauses, other specific clauses allow default termination for a contractor's failure to comply with specific contract provisions.²⁶⁶ For example, FAR 52.246-2, "Inspection of Supplies -- Fixed Price," allows termination for failure to replace or correct defective supplies, and FAR 52.246-12, "Inspection of Construction" allows termination for failure to replace or correct defective work. However, none of these 'specific' contract clauses expressly allows default termination for noncompliance with environmental laws or regulations.

Of course, the decision to terminate is a complex one. Even where the right to terminate exists under the relevant contract clauses, the contracting officer or other agency official must exercise discretion in making the termination decision,²⁶⁷ and must

²⁶⁴ *Id.* (1989 WL 123707, at 11) (Implicit in the Board's decision was that the government could not, by contract, shift this obligation to the contractor. *Id.*).

²⁶⁵ *Id.* (1989 WL 123707, at 33).

²⁶⁶ See J. Cibinic, *supra* note 233, at 62 (listing examples).

²⁶⁷ Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968).

find that termination "is in the Government's interest."²⁶⁸

B. Permits and Responsibilities Clause, FAR 52.236-7.

This clause is mandatory in fixed-price and cost-reimbursement construction contracts and fixed-price dismantling or demolition contracts.²⁶⁹ It provides that:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.²⁷⁰

This is a very broad provision which clearly tells construction and demolition contractors that they are responsible for complying, at no additional expense to the government, with any "applicable" laws, codes, and regulations issued by any level of government. This includes laws and regulations passed *after* the contract is awarded and performance has begun.²⁷¹ However, it will not always be a successful defense to a contractor's claim for increased costs of compliance with environmental laws.

²⁶⁸ FAR 49.101(b).

²⁶⁹ FAR 36.507.

²⁷⁰ FAR 52.236-7, Permits and Responsibilities (Nov 1991).

²⁷¹ Cheryl L. Nillson, *Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities*, 38 A.F. L. Rev. 1, 12 (1994), citing *Gulf Contracting, Inc.*, 84-2 BCA ¶ 17,472, ASBCA No. 27221 (1984); *Norair Engineering Corp.*, 73-1 BCA ¶ 9955, ENGBCA No. 3375 (1973).

In *Hemphill Contracting Company, Inc.*, the Engineering Board of Contract Appeals (ENGBCA) held that the contractor was entitled to the increased costs of performance incurred when the government changed a performance method in the contract to comply with a ruling of a State environmental agency.²⁷² This case involved a negotiated procurement for clearing land.²⁷³ The solicitation did not address a particular method for disposal of the trees and brush cleared.²⁷⁴ The contractor, during the negotiations, asked what burning method should be used, and was told "open air burning" by the government negotiator.²⁷⁵ The contractor expressed concern about local environmental laws, and the negotiator said the "contract was a 'government project' not subject thereto."²⁷⁶ The contractor calculated his proposal using the open air method of disposal, and the contract itself permitted open air burning.²⁷⁷ However, the Missouri Department of Natural Resources (DNR) had other ideas. They refused to issue a permit for open air burning, and indicated "air curtain burning" would be

²⁷² 94-1 BCA 26,491, ENGBCA No. 5776 (ENGBCA 1993) (1993 WL 476309).

²⁷³ 1993 WL 476309 at 1-2. The contract called for clearing and removal of all trees and brush from an area of Ellis Island in St. Charles County, Missouri. The land would be inundated by water once a lock and dam being built opened, and the trees and brush would be hazards to navigation. *Id.* at 2.

²⁷⁴ 1993 WL 476309 at 16.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* Other acceptable methods were: transporting from the area, and chipping within the cleared areas. *Id.* at 3.

required.²⁷⁸ Air curtain burning is more efficient and causes less pollution, because it burns at a higher temperature.²⁷⁹ It is also more expensive, and recognizing this, the government modified the contract twice, increasing the price by a total of \$455,000.²⁸⁰

The contractor submitted a claim for additional costs attendant to the change, which the successor contracting officer (C.O.) denied.²⁸¹ In doing so, the C.O. relied on the "Permits and Responsibilities" clause, as well as "Technical Provision 2B-4.2," of the contract, which specifically required compliance with "all applicable State and local air pollution laws."²⁸² The ENGBCA recognized that normally, the Permits and Responsibilities (P & R) clause "places the risk of added costs flowing from

²⁷⁸ Id. at 6. In air curtain burning, debris is piled into an excavation and ignited. Air is then injected into the pile through the air curtain burner, increasing the burn temperature. Id.

²⁷⁹ Id.

²⁸⁰ Id. at 16.

²⁸¹ Id. The contractor, when ordered to suspend burning, continued to stack debris for later burning. When air curtain burning began, it had to unstack the debris and move it to the excavated pits for burning. Id.

²⁸² Id. at 3. The technical provision read, in part:
"4.2 Burning: The Contractor shall comply with all applicable State and local air pollution restrictions. Subject to such restrictions and obtaining any permit which may be required by said State, the Contractor may burn material within the contract area, and at any time within the contract period, provided such burning does not cause the above standards to be exceeded or does not interfere with the inhabitants of the area by drastic changes in their accustomed environment, such as addition to air pollution or danger of fire. . . ."

compliance with local laws on the contractor.”²⁸³ However, several facts convinced the Board that the P & R clause was not a defense in this case.²⁸⁴ Specifically, the Board pointed to the fact that: this was a negotiated procurement; the method of performance (open air burning) was negotiated, the method agreed on was initially suggested by the government negotiator; the parties agreed open air burning would be the disposal method and “. . . this method was impliedly incorporated into the contract;” and the Corps directed the contractor to change to air curtain burning after the Missouri DNR decision.²⁸⁵ The Board found that when the government altered the performance method, a compensable change to the contract occurred, and Hemphill was entitled to an equitable adjustment for the additional costs of performance.²⁸⁶ In so finding, the Board, according to one article reviewing the *Hemphill* case, “mitigated the [P & R] clause’s harshness.”²⁸⁷

²⁸³ *Id.* at 16-17.

²⁸⁴ *Id.* at 17.

²⁸⁵ *Id.*

²⁸⁶ *Id.* (However, in its analysis of quantum, the Board determined that Hemphill was not entitled to an equitable adjustment over and above the \$455,000 it had already been paid by the government attendant to the change to air curtain burning). *Id.* at 49.

²⁸⁷ N. Causey, S. Tomanelli, J. Krump, D. Demoss, K. Ellcessor, T. Pendolino, A. Hughes, & S. Maizel, *1994 Contract Law Developments--The Year in Review*, 1995-Feb Army Lawyer 3, 65 (Feb. 1995). The courts and boards do not apply the P & R clause mechanically. *Compare River Equipment Company, Inc.*, 93-2 BCA 25,804, ENGBCA No. 5934 (ENGBCA 1993) (Contractor’s claimed assumption “that government had acquired all permits for in-stream material deposition” was not supported by contract specifications; contract specifications [including P & R clause] supported opposite assumption), *with Middlesex Contractors & Riggers, Inc.*, 89-1 BCA

It is questionable whether the Court of Federal Claims would reach the same result as the *Hemphill* Board. In Jack Walser d/b/a Jack Walser Constr. Co. v. United States,²⁸⁸ the court rejected a contractor's claim for an equitable adjustment under a contract to clear debris along a river in West Virginia.²⁸⁹ Walser claimed it encountered differing site conditions, including varying water levels, a state ban on burning tires, and beavers and people cutting down trees, that increased its costs under the contract.²⁹⁰ The contract included not only the P & R clause (FAR 52.236-7), but also a special clause entitled "Erosion and Pollution Control."²⁹¹ The latter stated that "[c]onstruction operations shall be carried out in such a manner that erosion and air and water pollution are minimized. State and local laws concerning pollution shall be complied with."²⁹² To dispose of debris, Walser had intended to burn tires to keep the piles of debris burning.²⁹³ Wasler argued that other contractors doing similar work engaged in this practice, and that it was unreasonable to expect Walser should have known the State

21, 557, IBCA No. 1964 (IBCA 1989) (Despite presence of P & R clause in contract, National Park Service (NPS) personnel obtained many permits itself; Board found contractor's conclusion that "NPS itself intended to provide all of the necessary permits except the building movement permits" to be a reasonable reading of the contract).

²⁸⁸ 23 Cl. Ct. 591 (1991).

²⁸⁹ Id. at 596.

²⁹⁰ Id. at 592.

²⁹¹ Id. at 594-95.

²⁹² Id. at 595.

²⁹³ Id.

ban would be enforced to prevent him from doing so.²⁹⁴ In addressing the tire ban, the court found two reasons to reject Walser's claim that the ban created a differing site condition.²⁹⁵ First, the ban on tire burning was not a changed physical condition under the differing site conditions clause.²⁹⁶ Second, the court relied on the P & R clause, and the "Erosion and Pollution Control" clause to hold that "[a]s a matter of law, an equitable adjustment is not available to Walser on the ground that it was prohibited from burning tires . . . because compliance with state environmental laws was Walser's responsibility under the contract."²⁹⁷

There are, of course, facts that distinguish the Walser and Hemphill cases. The key difference is the fact that, in Hemphill, the government issued a modification directing Hemphill to use air curtain burning, while in Walser, no change was ordered was ordered by the government. Because no change was ordered, Walser attempted to rely on the differing site conditions clause rather than the changes clause in seeking recovery.²⁹⁸ Additionally, it is significant that before the board in Hemphill, the

²⁹⁴ Id. at 594.

²⁹⁵ Id. at 594-95.

²⁹⁶ Id. at 594, citing Erickson-Shaver Contracting Corp. v. United States, 9 Cl. Ct. 302, 304 (1985).

²⁹⁷ Id. at 594-95. Accord, R.P.M. Construction Co., 90-3 BCA ¶ 23,051, ASBCA No. 36,965 (1990) (Board held that since contractor had obligation, under the P & R clause, to ascertain local requirements for underground storage tanks, including State law regarding amount of leakage permitted therefrom, it was not entitled to recover costs of bringing tanks into compliance with that law.).

²⁹⁸ Walser, 23 Cl. Ct. at 594.

government abandoned the P & R Clause as a defense.²⁹⁹

Nonetheless, the Claims Court's refusal to excuse Walser's failure to determine the legality and feasibility of tire burning prior to submitting its bid make one wonder if it would have excused Hemphill Contracting's failure to determine the legality and feasibility of open-air burning before submitting its proposal. This is particularly so in light of the fact that the contract in *Hemphill*, like the one in Walser, included both the P & R clause and a special contract clause requiring the contractor to comply with State and local environmental requirements.

C. Responsibility of Prospective Contractors, FAR Subpart 9.1.

The government's policy is to award contracts only to responsible contractors, and contracting officers must make an affirmative determination of responsibility before making a contract award.³⁰⁰ The rationale behind this policy is that awarding contracts solely on lowest evaluated price "can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs."³⁰¹ General standards of responsibility are set out in section 9.104-1 of the FAR. They require a prospective contractor to: 1) have adequate financial resources to do the job (or the ability to obtain them), 2) be able to meet the

²⁹⁹ *Hemphill*, 1993 WL 476309 at 16.

³⁰⁰ FAR 9.103, Policy.

³⁰¹ Id.

delivery or performance schedule, 3) have a satisfactory performance record, 4) have a satisfactory record of integrity and business ethics, 5) have the "necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them," 6) have the needed "production, construction, and technical equipment and facilities, or the ability to obtain them," and 7) "be otherwise qualified and eligible to receive an award under applicable laws and regulations."³⁰² When necessary, contracting officers may, with the assistance of specialists, develop "special standards of responsibility."³⁰³ The FAR states these may be desirable when experience has shown that "unusual expertise or specialized facilities are needed for adequate contract performance."³⁰⁴ When special standards are used, they must be set forth in the solicitation and must apply to all offerors.³⁰⁵ Guidance for applying the standards is provided in FAR section 9.104-3. Notably, the phrase "satisfactory performance record" is addressed in subparagraph (b). That subparagraph states in part that:

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to

³⁰² FAR 9.104-1 (a)-(g).

³⁰³ FAR 9.104-2.

³⁰⁴ Id.

³⁰⁵ Id.

consider in determining satisfactory performance. . . .³⁰⁶

Contracting officers have an obligation to obtain information about prospective contractors “sufficient to be satisfied that a prospective contractor currently meets” responsibility standards.³⁰⁷ Potential sources of information C.O.s can consult are: the offerors themselves; results of preaward surveys;³⁰⁸ the List of Parties Excluded from Federal Procurement and Nonprocurement Programs; “records and experience data, including verifiable knowledge of personnel” within various contracting offices; other government agencies; suppliers, subcontractors and customers of the prospective contractor; financial institutions; and business and trade associations.³⁰⁹ Ultimately, however, the burden is on the *prospective contractor* to affirmatively demonstrate its responsibility.³¹⁰

A contracting officer’s nonresponsibility determination will not be overturned by the General Accounting Office (GAO) absent bad faith on the part of contracting officials or the lack of a reasonable basis for the decision.³¹¹ In reviewing a

³⁰⁶ FAR 9.104-3, Application of Standards.

³⁰⁷ FAR 9.105-1, Obtaining Information.

³⁰⁸ DoD agencies, in conducting preaward surveys, must consider a variety of factors, including the prospective contractor’s “ability to meet specific environmental and energy requirements in the solicitation,” and “capability to manage and control government property.” DFARS 253.209-1(ii).

³⁰⁹ FAR 9.105-1, Obtaining Information.

³¹⁰ FAR 9.103(c).

³¹¹ *Becker and Schwindenhammer, GmbH*, B-225396, 87-1 CPD ¶ 235 (1987).

nonresponsibility determination based on recent contract performance, the GAO "will consider only whether the determination was reasonably based on the available information."³¹²

Contractors have been found nonresponsible for being cited repeatedly for environmental violations³¹³ and for failure to comply with State environmental reporting regulations on a previous government contract.³¹⁴ Additionally, the lack of knowledge of environmental requirements, or the lack of an environmental compliance plan have also resulted in nonresponsibility determinations.³¹⁵

In *Standard Tank Cleaning Corp.*,³¹⁶ Standard was found nonresponsible based on a preaward survey and information from federal and state agencies that showed a history of environmental violations.³¹⁷ Between August 1983 and March 1991, the New Jersey Department of Environmental Protection (DEP) cited Standard more than 150 times for violations.³¹⁸ Of those, 11 cases were still open as of the preaward survey, and

³¹² *Integrated Waste Special Services*, B-257057, 94-2 CPD ¶ 80 (1994), citing *Becker and Schwindenhammer, GmbH*, B-225396, 87-1 CPD ¶ 235 (1987).

³¹³ *Standard Tank Cleaning Corp.*, B-245364, 92-1 CPD ¶ 3 (1992).

³¹⁴ *Integrated Waste Special Services*, B-257057, 94-2 CPD ¶ 80 (1994) (protest denied).

³¹⁵ See *R.T. Nelson Painting Service, Inc.*, B-237638, 69 Comp. Gen. 234 (1990); and *Gilbert Construction Company, Inc. v. Engeleiter, et al*, 37 Cont. Cas. Fed. (CCH) ¶ 76,222 (1991).

³¹⁶ B-245364, 92-1 CPD ¶ 3 (1992).

³¹⁷ *Id.* at 2.

³¹⁸ *Id.* at 1.

Standard owed \$101,925 in penalties.³¹⁹ Another 26 cases were pending, and the New Jersey DEP was seeking \$7 million in fines for the violations.³²⁰ Even after the previous president had been convicted of illegal dumping of sludge off the New Jersey coast and severed all ties with the firm, 9 new environmental violations had occurred.³²¹ Based on the preaward survey report, the contracting officer found Standard nonresponsible.³²² Standard protested to the Navy, which denied the protest.³²³ The GAO, in denying the protest, discussed the broad discretion given contracting officers making responsibility determinations.³²⁴ Dispensing with the contractor's argument that it should be determined a responsible contractor because the matter of the violations was still pending in the New Jersey courts, the court determined that even "alleged" violations can be used in making a finding of nonresponsibility:

Under our standard of review, a nonresponsibility determination may be based upon the contracting agency's reasonable perception of the contractor's previous performance on government contracts, even where the contractor disputes the agency's interpretation of the facts or has appealed adverse determinations. *Firm Otto Einhaupl*, B-241553 *et al.*, Feb. 20, 1991, 91-1 CPD P 192. We think that this standard should also apply to a case such as this

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 7. Additionally, the New York Dept. of Environmental Conservation had revoked certain petroleum facility licences of affiliates of Standard and prohibited the operation of the affiliates' barges in New York waters. *Id.* at 4-5.

³²² *Id.*

³²³ *Id.* at 2.

³²⁴ *Id.* at 3.

where the determination concerns a firm's integrity as opposed to just its past performance on government contracts because in both instances the agency must consider and evaluate information concerning the firm's past operations.³²⁵

The Comptroller General (C.G.) found the determination of nonresponsibility followed the contracting officer's review of "detailed information concerning Standard Tank's history of poor environmental compliance," and was reasonable.³²⁶ Therefore, the C.G. denied the protest.³²⁷

In addition to finding contractors nonresponsible, agencies have rated prospective contractors' past performance as "marginally acceptable" due to past problems in complying with, for example, environmental laws and regulations covering hazardous waste management.³²⁸

D. Providing Government Property to Contractors, FAR Subpart 45.3.

³²⁵ *Id.* at 5.

³²⁶ *Id.* at 4-5. The C.G. also held that no *de facto* debarment occurred where Standard Tank Cleaning had been found nonresponsible under two "virtually contemporaneous procurements of similar services" based on the same information indicating a lack of responsibility. *Id.* at 3, citing *Becker and Schwindenhammer, GmbH*, B-225396, 87-1 CPD ¶ 235 (1987), and *The Aeronetics Div. of AAR Brooks and Perkins*, B-222516, B-222791, 86-2 CPD ¶ 151.

³²⁷ *Id.* at 7.

³²⁸ See *JCI Environmental Services*, 93-1 CPD ¶ 299 (1993) (Contracting officer found that "... before being terminated for default [on prior government contract], JCI had violated various EPA regulations and that government hazardous waste had been returned from disposal facilities and other waste was unaccounted for. . .," protest denied); and *CORVAC, Inc.*, 91-2 CPD ¶ 454 (1991) (CORVAC, during performance on the previous contract, "... left drums of hazardous waste behind by accident; mixed certain liquid wastes together without prior approval; and failed to bring the correct manifests with it to the pick-up;" protest denied).

FAR Subpart 45.3 details policies and procedures involved in providing government property to contractors.³²⁹ The term "property" broadly encompasses all property, real and personal, including facilities, material, special tooling and test equipment.³³⁰ The term "material" includes property that "may be incorporated into or attached to a deliverable end item or that may be consumed or expended in performing a contract."³³¹ The government retains title to all government-furnished,³³² and to specified types of contractor-acquired property.³³³

The government property provisions and clauses in the FAR represent a double-edged sword in terms of securing environmental compliance by contractors. For example, the provision at FAR 45.103, "Responsibility and liability for Government property," states that "[c]ontractors are responsible and liable for Government property

³²⁹ FAR 45.300. "Government property means all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in this section." FAR 45.101, Definitions.

³³⁰ FAR 45.101, Definitions.

³³¹ FAR 45.301, Definitions.

³³² See, e.g., FAR 52-245-2, Government Property (Fixed Price Contracts) (Dec 1989) (subpara. (c)(1)); FAR 52.245-5 (Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts) (Jan 1986) (subpara. (c)(1)); FAR 52.245-7 (Government Property (Consolidated Facilities) (Mar 1996) (subpara. (d)(1)).

³³³ See, e.g., FAR 52.245-2(c)(4) (title to material purchased by contractor from vendors passes to government upon vendor's delivery where the contract directs contractor to purchase material for which government will reimburse contractor as a direct cost under the contract); FAR 52.245-7(d)(2) (title to all facilities and components acquired by contractor from vendors passes to government on delivery by vendor where contractor is entitled to be reimbursed for purchase as a direct item of cost under the contract).

in their possession, unless otherwise provided by the contract.” However, the provision then excepts many contracts from its reach, including many negotiated fixed-price contracts,³³⁴ cost-reimbursement contracts, facilities contracts, and certain negotiated or sealed bid service contracts performed on government installations.³³⁵ This places the risk of loss on contractors in sealed bid and negotiated fixed-price contracts where certified cost or pricing data is *not* required to be submitted.³³⁶ Under the “risk of loss” provision in the government property clause (fixed-price contracts), the contractor is strictly liable for “any loss or destruction of or damage to, Government property. . . , [h]owever, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing the contract.”³³⁷

³³⁴ FAR 45.103(b)(1) excepts those fixed-price contracts for which the contract price is *not* based on one of the exceptions to the requirement, under the Truth in Negotiations Act (TINA) (10 U.S.C. § 2306a) to submit certified cost or pricing data in contracts expected to exceed \$500,000; that is, where cost or pricing data must be submitted. See FAR 15.804-1.

³³⁵ FAR 45.103(b). The service contracts excepted are those where the C.O. “determines that the Contractor has little direct control over the Government property because it is located on a Government installation and is subject to accessibility by personnel other than the contractor’s employees and that by placing the risk on the contractor, the cost of the contract would be substantially increased.” *Id.*

³³⁶ See JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 657 (3d Ed., 1995).

³³⁷ FAR 52.245-2(g). See, e.g., *Chromalloy Am. Corp.*, 76-2 BCA ¶ 11,997, ASBCA No. 19885 (1976). See also FAR 45.504(a) (“Subject to the terms of the contract and the circumstances . . . , the contractor may be liable for shortages, loss, damages, or destruction of Government property”); FAR 45.509 (Contractor responsible for proper use, care, and maintenance of Government property in its possession or control, “in accordance with sound industrial practice and the terms of

Contracting officers may see the government property clause as a tool to encourage environmental compliance on the part of contractors. However, its use in this respect is actually limited. First, as discussed above, the risk of loss and damage (including environmental damage) is typically on the contractor only in fixed-price contracts.³³⁸ Second, some practitioners see the clauses as providing a potential *defense* to environmental liability.³³⁹ Their rationale is that since the government retains title in government-furnished property, including components or materials incorporated into deliverable end items or properly consumed in performing the contract, the government should be liable for environmental harm caused by those materials or components.³⁴⁰ These commentators cited two federal court cases in support of this position.³⁴¹ Both cases (which did not involve government contracts) held manufacturers that provided raw materials to independent contractors liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for cleanup costs.³⁴²

the contract.”); and FAR 45.509-1 (Setting forth requirements of Contractor maintenance programs).

³³⁸ FAR 45.103; 52.245-2. In situations where the risk of loss is generally not on the contractor, an exception exists where the contractor’s management personnel exhibit “willful misconduct or lack of good faith.” *See, e.g.*, FAR 52.245-5(g)(iv-v).

³³⁹ C. Amantea & S. Jones, *supra* note 5 at 1617.

³⁴⁰ *Id.* at 1617-18.

³⁴¹ *Id.*

³⁴² *Id.*, citing United States v. Aceto Agricultural Chemicals Co., 872 F.2d 1373, 1379-82 (8th Cir. 1989); and United States v. Velsicol Chemical, 701 F. Supp. 140,

For example, in United States v. Aceto Agricultural Chemicals, a manufacturer furnished a pesticide, a hazardous raw material, to an independent contractor for formulation into a final product and packaging. While the manufacturer retained ownership of the pesticide throughout the formulation process, the contractor's activities resulted in soil contamination at the facility. Applying section 107(a) of CERCLA, the U.S. Court of Appeals for the Eighth Circuit held that the manufacturer may be responsible for the cost of cleaning up the contamination because the manufacturer owned the hazardous waste at the time of disposal.³⁴³

The authors then suggested the court's rationale could be applied to the government contracts arena, stating that "when the government furnishes or otherwise retains ownership of materials, the contractor may be able to shift all or a portion of its environmental liabilities to the contracting federal agency."³⁴⁴

E. Fines, Penalties, and Related Expenses as Unallowable Costs under the FAR Cost Principles.

A full discussion of contract costs is beyond the scope of this thesis. However, the subject of costs is an extremely important one in government contracts.³⁴⁵ The government uses the "cost principles" in Part 31 of the FAR to determine the extent to which it will reimburse contractors under cost-reimbursement contracts, and how much

142-43 (W.D. Tenn. 1987).

³⁴³ *Id.* (citations omitted).

³⁴⁴ *Id.* at 1618. See also R. Hall & R. Davis, *supra* note 158, at 190-191 (Discussing the lower (District) court's decision in Aceto and the Velsicol case, and concluding that "[s]ince Superfund provides that the Govt shall be liable to the same extent as a private person, the holdings in these cases are fully applicable to situations involving Govt contracts.").

³⁴⁵ D. ARNAVAS & W. RUBERRY, *supra* note 154, at 5-2.

it will pay on price adjustments under fixed-price contracts.³⁴⁶ Generally, to be “allowable,” a cost must be: (1) reasonable, (2) allocable to the contract, (3) consistent with the Cost Accounting Standards, if applicable, (4) consistent with the contract terms, and (5) consistent with any limitations in FAR Part 31.³⁴⁷

FAR Subpart 31.205, “Selected Costs,” sets out rules discussing the allowability of 52 selected categories of costs. One of the costs discussed is “Fines, penalties, and mischarging costs.”³⁴⁸ That provision provides, in part, that:

(a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or a written instructions from contracting officer.³⁴⁹

This is a broadly-worded provision making unallowable any fines or penalties incurred due to violation of, or noncompliance with, *any* laws or regulations, issued at virtually any level of government. The clause should be used by contracting offices to deny requests for payment made by contractors for fines or penalties where the contractor is responsible for the violation.³⁵⁰

³⁴⁶ *Id.*

³⁴⁷ FAR 31.201-2, Determining Allowability.

³⁴⁸ FAR 31.205-15.

³⁴⁹ *Id.* Subparagraph (b) makes “mischarging” costs unallowable. *Id.*

³⁵⁰ Cf. John F. Seymour, *Liability of Government Contractors for Environmental Damage*, 21 Pub. Cont. L.J. 491, 531 (Summer 1992) (Contractors should be held liable for fines and penalties where act or omission giving rise to an environmental violation occurred in area of responsibility clearly imposed on the

Contractors who run afoul of environmental laws or regulations might attempt to circumvent this cost principal by negotiating with environmental regulators to reduce the amount of any "fine" or "penalty" in exchange for completing a "supplemental environmental project" (SEP). Since SEPs do not fit squarely under the heading "fines and penalties,"³⁵¹ the contractor could then argue the costs of the SEP are reasonable costs incurred to comply with environmental laws, and thus are allowable. However, where the environmental damage is caused by a contractor's "wrongdoing" (e.g., violations of laws or regulations), the costs incurred in performing a SEP should be disallowed as "unreasonable" or "avoidable" costs.³⁵²

The effects of a fine or penalty being imposed on a contractor can be even more far-reaching than simply not being reimbursed by the government. First, the

contractor by the contract, and where contracting officer did not ratify action or require the contractor to take the action; but agencies should have discretion to reimburse contractors where, e.g., the violation arose, in part, from the act or omission of a third party; the fine results from negligence rather than intentional misconduct; or the contractor is new to the site.).

³⁵¹ See FAR 31.205-15, Fines, penalties, and mischarging costs, and FAR 31.001, Definitions (neither of which define "fines" or "penalties"). Cf. FAR 31.205-47, Costs related to legal and other proceedings ("Penalty" does not include restitution, reimbursement, or compensatory damages.).

³⁵² See Gerald P. Kohns, William J. McGowan, and Sharon E. Riley, *A Primer on Contractor Environmental Remediation and Compliance Costs*, 1993-Nov Army Lawyer 22, at 27-28 (Nov 1993) (Concluding such costs should be disallowed; citing DCAA Memorandum, Subject: Audit Guidance on the Allowability of Environmental Costs, DCAA, PAD 730.31/92-6 (14 Oct 1992) (reprinted in 58 Fed. Cont. Rep. (BNA) 500-06 (Oct. 26, 1992)). See also C. Nillson, *supra* note 271 at 34.

contractor's insurance may not cover any fine imposed.³⁵³ Further, under the cost principles, the contractor's legal and other expenses incurred in defending criminal actions resulting in conviction for violation of any law or regulation are unallowable.³⁵⁴ Likewise, legal expenses of civil actions are unallowable if the result is -- (1) a finding of contractor liability where the proceeding involves an allegation of fraud or where a monetary penalty is imposed, (2) a final decision to debar or suspend a contract or terminate a contract for default by reason of a violation or noncompliance with a law or regulation, or (3) disposition of the matter by consent or compromise where the outcome of the proceeding could have been one of the above.³⁵⁵ Finally, if a contractor attempts to bill the government for a clearly unallowable expense, such as a fine, it may be found to have submitted a false claim under the False Claims Act.³⁵⁶

While fines and penalties are unallowable costs to contractors, costs related to compliance with environmental laws, which are reasonable and allocable to

³⁵³ M. Mason & P. Smyth, *supra* note 172, at 53 (Encouraging lawmakers and regulators to "seek opportunities to capitalize on collateral consequences when possible.").

³⁵⁴ FAR 31.205-47. This includes any proceeding brought by a "Federal, State, local, or foreign government" and for violations not only by the contractor, but for those of its agents and employees. FAR 31.205-47(b).

³⁵⁵ FAR 31.205-47(b)(2). *See also* C. Nillson, *supra* note 271, at 24-30 (In-depth look at FAR provisions on fines, penalties, and related legal costs).

³⁵⁶ P. Morenberg, *supra* note 22, at 652, 664, 668. *See also* notes 152-153 *supra* and accompanying text.

government contracts may be allowable as indirect costs on cost-type contracts.³⁵⁷ In a fixed-price contract, however, unless compliance costs were anticipated in preparing a bid, a contractor may be unable to recover these costs.³⁵⁸

³⁵⁷ See *Environmental Issues in Government Contracting*, Topical Issues in Procurement (T.I.P.S.) (June 1990) at 9 (Encouraging contractors to try and recover such costs "because environmental cleanup costs are a cost of doing business."); Accord, R. Hall, Jr. & R. Davis, Jr., *supra* note 158, at 192 ("[B]y properly identifying environmental compliance expenditures and avoiding . . . fines and penalties, you should be able to recover your compliance costs as indirect costs."); C. Nillson, *supra* note 271, at 14-35. See also Gerald P. Kohns, *et al*, *supra* note 352 at 27; and Scott Isaacson & Peter A. McDonald, *Environmental Costs of Government Contractors: Cutting the Gordian Knot*, Fed. Cont. Report., Dec. 19, 1994, at 6-8 (Arguing that "[c]onsidering the contentious history of the draft environmental cost principle," the issue of allowability of environmental costs, such as costs of compliance, prevention, and remediation, should be specifically addressed by Congress).

³⁵⁸ R. Hall, Jr. & R. Davis, Jr., *supra* note 158, at 192 (Noting that the "Changes" clause may help a contractor where the government has modified the contract; but absent a modification, recovery will not be possible if a change to an applicable environmental law causes increased costs; citing *Warner Electric, Inc.*, 85-1 BCA ¶ 18131, VABCA No. 2106 (1985); *Overhead Electric Co.*, 85-2 BCA ¶ 18026, ASBCA No. 25656 (1985) (note)). See also C. Nillson, *supra* note 271, at 7-13 (While recovery may be possible in some circumstances under the "Changes" or "Differing Site Conditions" clauses, the "Permits and Responsibilities" clause is a significant limitation on recovery of unanticipated environmental costs in a fixed-price contract.).

CHAPTER 5

SHORTCOMINGS OF THE FAR AND PROPOSALS FOR CHANGE

A. The Arguments for Change.

1. The Use of Locally-Devised Provisions and Clauses.

Some contracting branches have inserted their own locally-devised contract specifications and clauses into contract schedules or statements of work to address environmental compliance issues not covered by standard contract provisions found in the FAR or agency supplements.³⁵⁹ For example, in *Inman & Associates, Inc.*,³⁶⁰ the specifications contained extensive environmental requirements in Section 01560, "Environmental Protection," portions of which follows:

1.3 GENERAL REQUIREMENTS: The Contractor shall provide and maintain environmental protection during the life of the contract as defined herein. Environmental protection shall be provided to correct conditions that develop during the construction of permanent environmental protection features, or that are required to control pollution that develops during normal construction practices but are not associated with permanent control features incorporated in the project. *The Contractor's*

³⁵⁹ K. Mattern & C. Nillson, *supra* note 111, at 25. The authors cited as an example this provision:

The Contractor is required to comply with the requirements for disposal of hazardous materials specified in the statement of work. The Contractor shall reimburse the Government for all costs associated with notices of violation levied on the Government attributable to the intentional or negligent acts or the Contractor and/or its personnel, as related to the disposal of hazardous materials. *Id.*

³⁶⁰ 91-3 BCA 24,048, ASBCA No. 37,869, ASBCA No. 37,928, ASBCA No. 38,185 - 38,186 (1991 WL 108556) (ASBCA 1991).

operations shall comply with all federal, state and local regulations pertaining to water, air, solid waste, hazardous waste and substances, oil substances, and noise pollution.

4.5 HAZARDOUS WASTE: Hazardous waste shall be handled, stored, manifested, and disposed of in accordance with federal, state and local regulations. All hazardous wastes generated on an activity, whether owned by the Government or owned by the Contractor, must be identified as being generated under the activity 'EPA Hazardous Waste Generated Number' for manifesting purposes. An example of hazardous waste, and instructions for its disposal, is:

4.6. POLYCHLORINATED BIPHENYLS (PCB) CONTROL:
Comply with 40 CFR 761 for removal and disposal of PCB containing articles. PCB is a toxic substance. . . .³⁶¹

Significantly, paragraph 1.3 required compliance not only with the Clean Air and Water Acts, but more expansively with all "regulations pertaining to water, air, solid waste, hazardous waste and substances, oil substances, and noise pollution."³⁶² The contract, awarded by the Department of the Navy, was for the construction of an electrical switching station.³⁶³ It included a requirement for the demolition of an existing capacitor bank.³⁶⁴ The capacitors contained oil containing PCBs.³⁶⁵ During the demolition, the contractor's employees intentionally dropped the capacitor bank to the

³⁶¹ *Id.* 1991 WL 108556, at 4-5 (emphasis added).

³⁶² *Id.*

³⁶³ 1991 WL 108556 at 3.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

ground from a height of about 12 feet.³⁶⁶ Nineteen of the 36 capacitors broke open, spilling oil containing PCBs onto the soil.³⁶⁷ The court relied on the environmental compliance clause to deny the contractor's claim for reimbursement for costs it incurred in controlling rainwater run-off from the PCB spill area,³⁶⁸ stating:

Control of run-off in the spill area was a state and federal statutory requirement that appellant was bound to comply with under the terms of the contract environmental protection specification. The Government is entitled to strict compliance with its specifications. H.L.C. & Associates Construction Company, Inc. v. United States, 176 Ct. Cl. 285, 367 F.2d 586 (1966).³⁶⁹

Since the requirement to control the run-off was imposed, in part, by the federal Clean Water Act, it is possible the contractor's claim may have been denied even if there were no special clause in the contract, assuming the "Clean Air and Water" clause discussed *infra* was an applicable clause in the contract.³⁷⁰ However, the presence of this special clause simplified the court's disposition of the claim, and avoided having to analyze the question of whether the contractor was required to control the runoff as part of its obligation to "use best efforts to comply with the CWA."³⁷¹

³⁶⁶ 1991 WL 108556 at 7.

³⁶⁷ *Id.*

³⁶⁸ 1991 WL 108556 at 17-18. The contractor's claim was for over \$13,000 for the costs of digging a sump pit and pumping the rainwater runoff from the pit into a tank truck.

³⁶⁹ *Id.*

³⁷⁰ See Chapter 1, section A.1. *supra*.

³⁷¹ As discussed earlier, this is not likely to be simple determination. See notes 22-32 *supra* and accompanying text.

Similar broadly-worded clauses have been used readily by the other defense agencies and the Department of Energy.³⁷² The use of these broadly-worded environmental compliance clauses by contracting agencies is an indicator that they find the minimal FAR regulations on environmental compliance inadequate. However, more recently, the use of non-standard contract clauses has been discouraged within some federal agencies, including the Department of Energy.³⁷³

2. The FAR is "out-of-step" with current Environmental Laws and Regulations.

As identified at various points in this thesis, the FAR hasn't kept pace with the proliferation of environmental laws and regulations at the federal and state level which started in the 1970s and continued into the 1990s.³⁷⁴ Thus, the limited reach of part 23 of the FAR, which only specifically addresses compliance with the Clean Air Act and

³⁷² See, e.g., *Monde Const. Co., Inc.*, 89-3 BCA ¶ 22,124, ASBCA No. 38,099, 1989 WL 90338 (ASBCA 1989) (Contractor to comply with specific, detailed requirements regarding cleanup and disposal of asbestos, lead, and hazardous wastes in construction contract); *G. D'Alesio S.A.S.*, 86-1 BCA ¶ 18,732, ASBCA No. 31,149, 1986 WL 19630 (ASBCA 1986) (Contractor to comply with all Federal, state, and foreign government local laws, ordinances and regulations regarding environmental pollution during the processing, handling, shipping or use of material purchased from DoD); *Robert P. Jones Co.*, 85-1 BCA ¶ 17,747, ENGBCA No. 5073 (1984 WL 13844) (E.B.C.A. 1984) (Road repair contractor to comply with all local, State, and Federal laws and regulations pertaining to surface mining, safety, and environmental protection).

³⁷³ DoE Reform Initiatives, Fed. Cont. Daily (BNA), February 24, 1993 ("... DoE is attempting to delete as many nonstandard contract clauses as possible from its contracts.").

³⁷⁴ See Seymour, *supra* note 350, at 493 (citing "... the failure of the standard contract principles and clauses in the Federal Acquisition Regulation (FAR) to address environmental liabilities ..." as one of the factors causing confusion in the area of contractor liability for environmental damage).

Clean Water Act, and then only imposes limited CAA and CWA compliance responsibilities on contractors. Some federal agencies have attempted to fill the gap with their agency-specific supplements. For example, DoD has supplemented the FAR with their provision requiring reimbursement from cleanup contractors for penalties imposed on or damages suffered by the government caused by that contractor's breach of any term of the contract, or negligent or willful act or omission of the contractor or its employees.³⁷⁵ The Department of Energy has gone much further in its management and operating contracts, inserting a contract clause which specifically requires contractors to comply with, or assist the department in complying with, over 25 separate federal environmental statutes as well as federal and non-federal directives, regulations, codes, ordinances, and so forth.³⁷⁶ In other contexts, agencies have drafted specific environmental compliance specifications or clauses in attempts to fill a perceived gap, as discussed in section A.1. above.

B. Specific Proposals for Change.

1. Broaden the scope and reach of FAR Part 23.

The FAR subpart directly applicable to environmental compliance purports to "prescribe acquisition policies and procedures for supporting the Government's program for . . . *protecting and improving the environment* through pollution control, energy conservation, identification of hazardous material, and use of recovered

³⁷⁵ DFARS 252.223-7005(c). See notes 71-74 *supra* and accompanying text.

³⁷⁶ DEAR 970.5204-62. See notes 75-79 *supra* and accompanying text.

materials.”³⁷⁷ However, the subpart fails to provide the authority to do much more than help ensure compliance with the Clean Air and Water Acts, OSHA requirements relating to hazardous material identification, the Drug-Free Workplace Act, and the recovered materials provisions of RCRA. This falls far short of the stated goal of “protecting and improving the environment through pollution control”³⁷⁸ Pollution control, of course, includes protecting our air and water. However, there is much more to pollution control than those two federal statutes. In fact, “just” protecting our water requires much more than simply enforcing the CWA. The effective enforcement of such statutes as the Safe Drinking Water Act (SDWA),³⁷⁹ the Toxic Substances Control Act (TSCA),³⁸⁰ the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),³⁸¹ the Pollution Prevention Act of 1990 (PPA),³⁸² RCRA,³⁸³ CERCLA,³⁸⁴ and others, as well as State and local environmental laws, can directly or indirectly impact the quality of our nation’s waters. Further, as discussed in Chapter 1, the requirements relating to the identification of hazardous wastes are designed to protect government employees, and

³⁷⁷ FAR 23.000 (emphasis added).

³⁷⁸ *Id.*

³⁷⁹ 42 U.S.C. § 300 *et seq.*

³⁸⁰ 15 U.S.C. § 2601 *et seq.*

³⁸¹ 7 U.S.C. § 136 *et seq.*

³⁸² 42 U.S.C. § 13101 *et seq.*

³⁸³ 42 U.S.C. § 6901 *et seq.*

³⁸⁴ 42 U.S.C. § 9601 *et seq.*

do little to "protect and improve" the environment.³⁸⁵

The FAR should be amended to add certain key environmental statutes to certain sections of FAR Part 23. First, the "Authorities" section, FAR 23.102, should be amended to include every major federal environmental statute.³⁸⁶ At a minimum, the following statutes should be specifically listed: Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA), RCRA, CERCLA, Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Pollution Prevention Act of 1990 (PPA), and the Emergency Planning and Community Right-to-Know Act (EPCRA).³⁸⁷ Second, the "Policy" section, FAR 23.103, should be amended. Specifically, I recommend that a sentence be added to FAR 23.103(a), which would then read (proposed changes in italics):

(a) It is the Government's policy to *protect and improve* environmental quality. Accordingly, executive agencies shall conduct their acquisition activities in a manner that will result in effective enforcement of the Clean Air Act (the "Air Act") and the Clean Water Act (the "Water Act"). *Further, agencies will structure acquisitions to require government contractors to comply with all federal, state, and local environmental laws and regulations.*

The first suggested change to this section, adding the words "protect and" to the first

³⁸⁵ See note 54 *supra* and accompanying text.

³⁸⁶ See, e.g., the EPA suspension and debarment regulations at 40 CFR Part 32, which cite as authority the following: the Clean Air Act, the Clean Water Act, TSCA, FIFRA, RCRA, CERCLA, the Safe Drinking Water Act, the Noise Control Act (42 U.S.C. § 4901 *et seq.*), and the Asbestos School Hazard Abatement Act (20 U.S.C. § 4011 *et seq.*), as well as other statutes and several executive orders.

³⁸⁷ See notes 76-77 *supra*.

sentence, simply brings the “policy” section in line with the FAR part 23 “scope” section, FAR 23.000. The change adding the third sentence will require, as part of a government-wide policy, that contracts be written to place an obligation to comply with environmental laws and regulations on contractors. However, it is purposely different than saying agencies will structure their procurement activities “in a manner that will result in effective enforcement” of laws other than the CWA and CAA.

The Clean Air and Water certification, FAR 52.223-1, has its basis in the Clean Air and Clean Water Acts, which specifically prohibit federal agencies from entering into contracts with those convicted of violating certain provisions of the two acts until the EPA Administrator certifies that “the condition giving rise to the conviction has been corrected.”³⁸⁸ Absent a similar statutory basis precluding entering contracts with violators of other environmental laws, procuring activities should not be attempting to “effectively enforce” these other laws. However, they should be trying to place the burden of environmental compliance on the party in the best position to comply -- the contractors performing the work.

2. Identify Known or Anticipated Environmental Requirements in Solicitations and Contract Specifications.

Where it is known that a contractor will need to comply with, for example, the Toxic Substances Control Act or RCRA, the solicitation should contain a provision

³⁸⁸ See note 43 *supra* and accompanying text.

specifically placing the potential offerors on notice of those anticipated requirements.³⁸⁹

The solicitation provisions regarding compliance responsibilities should also be incorporated into contract specifications or clauses. This will allow the offerors to attempt to estimate any costs they will incur in complying with the relevant laws, and hopefully, allow them to realistically price their proposals. Further, once the contractor contractually agrees to comply with specific environmental provisions, they will be deterred from noncompliance by the risks of default termination for noncompliance with contract provisions,³⁹⁰ potential suspension or debarment, and by the possibility of being sued under the False Claims Act.³⁹¹ The best way to accomplish this would be to have an "Environmental Compliance" clause, which advises contractors of their obligations, (similar to, but more specific than, the Permits and Responsibilities clause in construction contracts), such as the following:

Environmental Compliance

The contractor must comply with all federal, state, and local environmental laws, directives, regulations, codes, and ordinances. By way of illustration, and not limitation, the contractor must comply with the following:

[Contracting agency should here list those federal, state, and local environmental requirements reasonably anticipated to impact the contractor's performance]³⁹²

³⁸⁹ See notes 26-28 *supra* and accompanying text.

³⁹⁰ See chapter 4, section A *supra*.

³⁹¹ See note 149 *supra* and accompanying text.

³⁹² Some may consider use of this clause risky in light of the concept of "ejusdem generis." This phrase means "of the same kind, class, or nature," and

3. Revise the Suspension and Debarment Provisions.

As identified in Chapter 3, the suspension and debarment provisions in FAR Subpart 9.4 do not expressly authorize either action for violations of environmental laws. This has resulted in the Department of Defense making arguments that criminal violations of statutes other than the CAA and the CWA show a "lack of business integrity or business honesty that seriously and directly affects . . ." the contractor's present responsibility.³⁹³

Specific provisions should be added to FAR section 9.407-2, "Causes for Suspension" and FAR section 9.406-2, "Causes for Debarment." In these times of increased environmental awareness, it seems ironic that commission of an unfair trade practice, or a violation of the Drug-free Workplace Act would constitute a specific ground for suspension, while even repeated, serious, criminal violations of RCRA³⁹⁴ or

provides that in the "construction of laws, wills, and other instruments, . . . where general words follow an enumeration of persons or things, . . . such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." BLACK'S LAW DICTIONARY 464 (5th ed. 1979) (citations omitted). However, the rule should not apply in this context, since in the proposed clause, no "general words" would *follow* the "enumeration of . . . things," instead, specific statutes and regulations would be listed *following* the introductory language "[b]y way of illustration, and not limitation." See Steven H. Gifis, LAW DICTIONARY 152 (2d Ed. 1984). Moreover, even if the rule is found applicable, as long as agency contracting personnel list the key environmental laws and regulations applicable to a project, other environmental laws and regulations should be found to be "of the same general kind or class" as those listed in the clause.

³⁹³ See notes 171-173 *supra* and accompanying text.

³⁹⁴ See, e.g., 42 U.S.C. § 6928(d) (Criminal penalties under RCRA can include fines of up to \$50,000 per day of violation, imprisonment for up to five years, or both; for a second conviction of the same person the applicable maximum sentence (both the

TSCA³⁹⁵ will not support suspension unless the violation is found to indicate a “lack of business integrity or business honesty that seriously and directly” affects a contractor’s present responsibility. Similarly, the debarment provision allows debarment for intentionally affixing a “Made in America” label to products sold in or shipped to the United States which were not made in the United States.³⁹⁶ However, committing a “knowing endangerment” offense under RCRA, which carries a possible 15-year prison term, does not by itself, support debarment.³⁹⁷

4. Revise the Default Clauses.

fine and imprisonment) “shall be doubled.” For “knowing endangerment” offenses, the maximums jump to a fine of up to \$250,000 and up to 15 years imprisonment. 42 U.S.C. § 6928(e)).

³⁹⁵ See, e.g., 15 U.S.C. § 2615(b) (Providing fines of up to \$25,000 per day for each day of violation, or imprisonment for up to one year, for knowing or willful violations of sections 2614 or 2689 of TSCA).

³⁹⁶ FAR 9.406-2(a)(4).

³⁹⁷ 42 U.S.C. § 6928(e), “Knowing Endangerment,” provides:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

All of the Default clauses should be revised to add an additional specific basis for termination for default, as follows:

[Fails to --] Comply with applicable federal, state, or local environmental laws or regulations where such violation caused, or had the potential to cause, significant environmental damage or harm, or involved false statements, false reports (including monitoring reports, toxic release inventory (TRI) reports and similar reports), fraud, or similar conduct on the part of the contractor.

Of course, certain terms, such as "significant" and "environmental damage or harm" would have to be defined. Such a clause would avoid having to determine whether the contractor violated "other provisions" of the contract, and whether or not the provision(s) violated were "material" provisions or terms. Additionally, since the Default (Fixed-Price Construction) clause does not contain the "failure to comply with any other provisions" language found in services and supply contracts, adding this provision to the default clause would provide a grounds for default termination for an environmental violation without having to make a determination that the violation was tantamount to a refusal or failure "to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified" ³⁹⁸

In order to provide contractors an opportunity to address whether there was an environmental violation or false/fraudulent report and what impact it had, there should be a requirement for a cure notice. For the supply/services contract default clause, this could be accomplished by adding "(but see subparagraph (a)(2) below)" following the language suggested above.

³⁹⁸ FAR 52.249-10. See notes 241-247 *supra* and accompanying text..

A less effective alternative, in this author's opinion, would be for the FAR Council to propose a less dramatic change: adding the "violation of any other provision" language found in the R & D and supply/service contract default clauses to the Default (Fixed-Price Construction) clause.

5. Strengthen the EPA Listing Program. Rather than the regulatory changes the recommendations above would require, this recommendation would require statutory change, possibly to a number of different statutes. As discussed in section B.2 of Chapter 3 *supra*, the EPA Listing program allows the Administrator to extend Clean Air Act ineligibility to other facilities owned or operated by the CAA violator, but not involved in the violation.³⁹⁹ However, the Administrator lacks the same discretion under the Clean Water Act. The Listing program should be revised to harmonize the two statutes, giving the Administrator discretionary authority to extend Clean Water Act ineligibility to other facilities owned or operated by the person convicted of CWA violations. Therefore, section 508(a) of the CWA⁴⁰⁰ should be amended to add the same language found in the last sentence of CAA section 306(a), which reads: "[t]he Administrator may extend this prohibition to other facilities owned or operated by the convicted person."⁴⁰¹

Additionally, the EPA and should give careful consideration to whether contractor "listing" should be mandatory for facilities owned or operated by persons

³⁹⁹ 42 U.S.C. § 7606(a).

⁴⁰⁰ 33 U.S.C. § 1368.

⁴⁰¹ 42 U.S.C. § 7606(a).

convicted of violating other key environmental statutes, such as the Solid Waste Disposal Act (and the 1976 Resource Conservation and Recovery Act (RCRA) Amendments thereto), the Toxic Substances Control Act (TSCA), and the Safe Drinking Water Act (SDWA). If the EPA believed this to be in the government's interests, it could then work with Congress to add listing provisions to those other statutes.⁴⁰²

C. Potential Obstacles to Change.

Convincing the Federal Acquisition Regulatory Council to adopt recommended changes to the FAR could prove a daunting task for any person or agency attempting it. In the August 1995 Nash & Cibinic Report, for example, Professors Ralph Nash, Jr. and John Cibinic, Jr. noted that they had previously "chided" the FAR Council for "not having a system for fixing obvious glitches in" the FAR.⁴⁰³ The authors then went on to complain that the FAR Council's "most striking deficiency" was its "almost total absence from the world of acquisition reform."⁴⁰⁴ The professors noted that "regulations filling out statutes are entitled to great deference," and said that it was time

⁴⁰² Cf. DeVecchio & Engel, *supra* note 172, at 59 (Stating it appeared likely the listing sanction would be added to other environmental statutes other than the CAA And CWA).

⁴⁰³ 9 Nash & Cibinic Report ¶ 46, *ACQUISITION REFORM: Why is the FAR Council Not a Participant*, at 121 (August 1995) (citing the *Dateline* section of the January 1995 Nash & Cibinic Report).

⁴⁰⁴ *Id.*

for the FAR Council to “step up to the plate and take its turn at bat.”⁴⁰⁵ They then suggested two specific changes be made to FAR Subpart 15.6, and went on to encourage the FAR Council to “totally rewrite” the subpart.⁴⁰⁶

A second concern is whether the idea of adding additional provisions to the FAR to ensure environmental compliance can be done consistent with the “acquisition reform” (or “reinventing federal procurement”) movement. The movement seems to be encouraging the *elimination* of FAR provisions not mandated by statute.⁴⁰⁷ However, support can be found for adding appropriate regulations that are consistent across all federal agencies.⁴⁰⁸ An October 1994 article by Owen Birnbaum, the former Special Assistant to the Administrator, Office of Federal Procurement Policy, indirectly

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* (The specific recommendations dealt with the concepts of “discussions” and “competitive range determinations”).

⁴⁰⁷ See, e.g., R. Mangrum and E. Marcotte, *supra* note 2, at S 45 (Discussing the FAR re-write project and the re-write of FAR Part 15 in particular, the authors state: “The [FAR] Council has made clear that any regulatory provision not mandated by statute is a potential candidate for elimination.”). See also National Performance Review, 1993 Report: *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, 35 GC ¶ 558 (goal is to “[s]implify the procurement process by rewriting federal regulations – shifting from rigid rules to guiding principles;” new regulations will, among other things “end unnecessary regulatory requirements.”).

⁴⁰⁸ See, e.g., *Environment; Reforms Urged to Avoid Pentagon Payment of Billions in Contractor Cleanup Costs*, Federal Contracts Daily (BNA), Dec. 2, 1993 (Reporting that the House Government Operations Committee released a study which concluded that the then-current “patchwork of Federal Acquisition Regulations” was inadequate to ensure consistent treatment of contractor claims for environmental cleanup costs; Committee advocated adding several provisions to the FAR to deal with environmental cleanup costs, as well as a “comprehensive environmental cost principle.”).

supports the idea that sometimes, more is better. In "Rewriting the FAR: A Dangerous Boondoggle,"⁴⁰⁹ Mr. Birnbaum states that what we need is "... a FAR that is as *complete as possible*, that severely limits agency and subagency implementation, that directs the CO when required or necessary, ... and that achieves needed consistency and uniformity for the benefit of Government and industry alike. That is the direction that 'reinvention,' if any, should take."⁴¹⁰ Commenting on Mr. Birnbaum's article, Professor Cibinic stated: "[a]nd, despite the NPR's criticism, not all 'rigid' rules are bad. As Owen points out, consistency and uniformity have a number of beneficial functions, among which is the equal treatment of contractors."⁴¹¹

The recommendations proposed above will, in my opinion, help make the FAR as "complete as possible" with respect to environmental compliance questions, and will help provide consistency and uniformity that has, in some cases, been lacking. Therefore, I believe they can be implemented consistent with the concepts of "acquisition reform" and "reinventing federal procurement."

⁴⁰⁹ 8 Nash & Cibinic Report ¶ 57, at 152 (October 1994).

⁴¹⁰ *Id.* (Emphasis added).

⁴¹¹ *Id.* at 153, *Addendum*. Professor Cibinic also commented that "[b]y and large, the FAR is a workable document. What it needs is fine-tuning, not a major overhaul." *Id.*

CONCLUSION

Through the passage of numerous environmental statutes over the past three decades, the United States Congress and the individual state legislatures have indicated that protection and restoration of the environment are important priorities. To help implement these statutes and the implementing rules and regulations thereunder, the United States government has a responsibility to contract only with "environmentally responsible" contractors, and to have the proper tools to ensure that government contractors comply with all environmental laws and regulations. Where that fails, the government must have the tools to compel contractors to fix any environmental damage they've caused, and to terminate the government's relationship with the contractor, when warranted by the circumstances.

The federal government has a variety of environmental "compliance" or "enforcement" tools at its disposal. One group of tools it can use are the criminal and civil enforcement proceedings available in the event a contractor violates certain of the environmental laws. However, these can prove very time-consuming and cumbersome. Additionally, the agency which contracted with the violator (and which was likely harmed in some way by the violation) often has little say in whether (and what) action will be taken against the violator, such decisions often being matters of "prosecutorial discretion," resting with federal or state enforcement officials. The False Claims Act, discussed extensively in Chapter 2, is also an "enforcement tool," and one which is being used more frequently, and with increasing success (particularly by *qui tam*

relators), in the environmental arena. Another tool the government can, and should use to ensure environmental compliance is the Federal Acquisition Regulation. However, agencies have heretofore under-utilized the relevant FAR provisions for this purpose, and when agencies have attempted to compel environmental compliance under the FAR, the regulations have sometimes proven ineffective.

While the FAR contains certain limited provisions and contract clauses designed to ensure government contractors comply with environmental laws, the current clauses do not go far enough. Since the government uses the FAR to regulate how the majority of federal contracts are awarded and administered, positive changes to the FAR should have wide-ranging, positive results.

For example, in several of the cases discussed above, federal courts and the boards of contract appeals either refused to hold contractors liable for environmental damage and environmental violations, or granted a contractor's request for additional compensation for the costs of compliance, because of either unclear contract requirements, or inadequate direction from the government. Further, some of the "environmental provisions" of the FAR, such as Subpart 23.4, Use of Recovered Materials, only put real obligations on the government, and do not place any significant environmental compliance responsibilities on contractors. By implementing the changes to the FAR recommended above, the federal government would be in a stronger position to ensure environmental compliance by its contractors in the future.

In this author's view, the two most glaring weaknesses of the current version of the FAR are the narrow focus on contractor compliance with the Clean Air Act and

Clean Water Act, and the failure to specifically state that environmental violations can lead to termination for default or suspension, debarment, or EPA Listing. The recommendations proposed herein would, if adopted, be a significant first step towards addressing these specific weaknesses.